Supreme Court, U.S.
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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SEA SAVAGE, INC., UNDERWRITERS SUBSCRIBING TO POLICY A&PH 12890 and AMERICAN HOME ASSURANCE COMPANY
Petitioner,

v.

CHEVRON U.S.A., INC.
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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119 pp

QUESTIONS PRESENTED

Following a bench trial, the district court entered a judgment against petitioner and respondent and in favor of Barbara Randall, the estate of Theodore F. Randall, Jr., Rod Anthony Randall, and Holly L. Randall in the amount of $1,960,194.00 in damages for the wrongful death of Theodore F. Randall, Jr. which occurred on July 31, 1989. In a hearing prior to trial, the district court further orally held that Theodore F. Randall, Jr. was a longshoreman at the time of his death within the meaning of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* and that the claims for damages arose under 33 U.S.C. § 905(b). In subsequent opinions, the district court found that petitioner, Sea Savage, Inc., and its underwriters, were obligated to defend and indemnify respondent, Chevron U.S.A., by virtue of the relevant contracts and policies of insurance. *Randall v. Chevron U.S.A., Inc.*, 788 F. Supp. 1391 (E.D.La. 1992); *Randall v. Chevron U.S.A., Inc.*, 788 F. Supp. 1398 (E.D.La. 1992). The Fifth Circuit affirmed on the issue of Randall's status as a longshoreman and the insurance issues. 13 F.3d 888 (5th Cir. 1994). In so doing, the Fifth Circuit held that a land-based worker, transiently and fortuitously injured on navigable waters, is a "maritime employee" under 33 U.S.C. § 902(3) and thus entitled to compensation under the Longshore and Harbor Workers' Compensation Act. This holding placed the Fifth Circuit in direct conflict with the Eleventh Circuit opinion in *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).

The question presented is:

1. Whether an exclusively land-based worker is transformed into a longshoreman within the meaning of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, simply because he is fortuitously injured or killed during transportation over navigable waters?

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No.

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CHEVRON U.S.A., INC.
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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Sea Savage, Inc., Underwriters Subscribing to Policy A&PH 12890 and American Home Assurance Company, (hereinafter collectively referred to as "Sea Savage"), respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.[1]

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[1] Petitioner Sea Savage, Inc. is a subsidiary or related corporation of Graham Offshore, Inc. The lead participating underwriter of "Underwriters Subscribing to Policy A&PH 12890" is the Royal Insurance Company, with the remaining participating underwriters consisting of various Underwriters at Lloyds. American Home Assurance Company is a subsidiary of the American International Group of companies. Chevron U.S.A., Inc. is a division or subsidiary of the entity formerly known as Standard Oil of California and which operates world-wide under the trade name "Chevron".

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 13 F.3d 888 (5th Cir. 1994) and is reprinted in the Appendix to this Petition at Pet. App. 1a-46a. Suggestions for Rehearing *en banc* have been filed both by Petitioners and Respondent and have yet to be ruled upon. The opinions of the district court on a variety of issues are reprinted in the Appendix and appear at Pet. App. 47a-100a. Certain of these decisions are published and reported at 788 F. Supp. 1391 (E.D.La. 1992) and 788 F. Supp. 1398 (E.D.La. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1994. Suggestions for Rehearing have been filed by all parties though have yet to be ruled upon. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(c).

STATEMENT

The petition in this case arises from a decision of the United States Court of Appeal for the Fifth Circuit which answers a question posed, though undecided, by this Court in two separate opinions. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, at 324, n.34, 103 S.Ct. 634, at 651, n.34, 74 L.Ed.2d 465 (1983); *Herb's Welding v. Gray*, 470 U.S. 414, at 427, n.13, 105 S.Ct. 1421, at 1429, n.13, 84 L.Ed.2d 406 (1985). The Fifth Circuit has found that coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA) extends to a worker injured while transiently or fortuitously on navigable waters although his employment duties are performed entirely on land.

On July 31, 1989, Theodore Randall, a mechanic employed by Chevron U.S.A., tragically drowned after unsuccessfully attempting to board the M/V SEA SAVAGE from Chevron's West Delta 27 P-1 platform located in

the territorial waters of the State of Louisiana. No party disputed the fact that all of Mr. Randall's employment duties were performed on fixed platforms located in state territorial waters.[2] At the time of the casualty, a tropical storm was approaching the area of the West Delta field. The SEA SAVAGE had been ordered by Chevron to evacuate Mr. Randall from the platform notwithstanding the deteriorating weather conditions.

Suit was brought against Sea Savage and Chevron seeking to recover damages for his wrongful death, pleading jurisdiction, alternatively, under 28 U.S.C. § 1332 and 28 U.S.C. § 1333. Chevron appeared and impleaded Sea Savage's Protection and Indemnity insurers, Underwriters Subscribing to Policy A&PH12890 and American Home Assurance Company, seeking the benefit of coverage under those policies by virtue of Chevron's status as an additional assured.

Prior to trial, the district court entertained several motions that shaped the ultimate resolution of the litigation. On October 31, 1991, Judge Morey L. Sear of the United States District Court for the Eastern District of Louisiana orally held that Mr. Randall was a longshoreman within the meaning of the LHWCA at the time of his death and that the claims against all defendants would be governed by 33 U.S.C. § 905(b).[3] In the week preceding trial, Judge Sear also orally held that Chevron did not have the benefit of Sea Savage's Protection and Indemnity insurance as an additional assured because it could only be held liable as "time charterer", and not "as owner" of

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[2] See 13 F.3d 888, at fn. 5.

[3] See Pet. App. 47a. 33 U.S.C. § 905(b) allows a longshoreman to file suit against a vessel owner or time charterer for negligence, even where the time charterer is the employer of the plaintiff. *Kerr-McGee v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987).

the M/V SEA SAVAGE.[4] A bench trial was conducted between November 12 and November 14, 1991. At the conclusion of the evidence, Judge Sear rendered oral findings of fact and conclusions of law, allocating 75% of the liability to Sea Savage and 25% to Chevron.[5] Judge Sear awarded damages to the Randall family of $1,960,104.00.[6]

The defendants timely moved for a new trial. Judge Sear issued four separate opinions addressing the issues raised in these motions. The most significant of these was on March 16, 1992, wherein Judge Sear reversed his prior holding on the insurance coverage issue, finding that Chevron did, indeed, have the benefit of Sea Savage's Protection and Indemnity insurance coverage as an additional assured. This decision flowed from the district court's conclusion that, since Mr. Randall was a longshoreman, Chevron, as his employer, could only be sued for "vessel negligence" under § 5(b) of the LHWCA.[7] For this reason, the district court refused to consider any negligence on the part of Chevron in its capacity as the owner and operator of an offshore oil platform, negligence which unquestionably would not have been covered under the vessel's marine Protection & Indemnity policy.[8]

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[4] No minute entry reflects this decision. However, Judge Sear has memorialized these events in a subsequent opinion which appears in Pet. App. 81a-96a. See, also, 788 F. Supp. 1398 (E.D.La. 1992).

[5] The transcript of these oral reasons is reprinted at Pet. App. 48a-57a. The proceedings were recorded on videotape and thus were not stenographically recorded.

[6] Judgment, November 25, 1991, reprinted at Pet. App. 58a-59a.

[7] *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1339 (5th Cir. 1987), *cert. denied*, —— U.S. ——, 112 S. Ct. 274, 119 L.Ed.2d 201 (1992).

[8] Such policies only cover fault "as owner" of a vessel, and have been traditionally interpreted to exclude claims brought against oil companies for negligence committed in their capacity as owner of offshore structures. *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971), *cert. denied*, 406 U.S. 921, 92 S.Ct. 1779, 32

Thus, the decision on Mr. Randall's status as a longshoreman was central to the ultimate allocation of financial responsibility for the casualty.

On February 11, 1994, the Fifth Circuit affirmed in part, reversed in part, and remanded the action for further proceedings. *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994). The panel explicitly affirmed the holding that Mr. Randall was a longshoreman, relying upon its earlier opinion in *Fontenot v. A.W.I., Inc.*, 923 F.2d 1127 (5th Cir. 1991). However, the panel expressed reservations about this holding since it seemed to ignore certain language contained in this Court's opinion in *Perini, supra.* Furthermore, this decision placed the Fifth Circuit in direct conflict with the Eleventh Circuit on this issue in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 688 (1991). Suggestions for Rehearing and Rehearing *En Banc* have been filed though not ruled upon.[9]

L.Ed.2d 120 (1972). Among the allegations not considered by the district court, though set forth in the pre-trial order, were the following: (i) Chevron's failure to modify its hurricane evacuation plan; (ii) Chevron's decision to delay the evacuation by ordering its personnel to secure equipment; (iii) Chevron's failure to timely evacuate the field; and (iv) Chevron's decision not to use a helicopter to evacuate the field.

[9] After briefs were submitted to the Fifth Circuit, petitioners settled all claims made by the Randalls. As part of the settlement agreement, petitioners obtained all rights, claims, and causes of action the Randall family had against respondent.

REASONS FOR GRANTING THE WRIT

In holding that an employee whose work duties are performed entirely within state territorial waters on fixed platforms satisfies the "status" component of the test for LHWCA coverage, the Fifth Circuit has broadly expanded the scope of the Act to include workers who have no connection with traditional maritime activity. The Fifth Circuit's opinion creates uncertainty for the employers of numerous workers engaged in the offshore oil industry or otherwise employed on or near navigable waters for it allows those workers to "float" in and out of the coverage of the Longshore Act depending solely on the fortuitious *situs* of their injury.

The decision of the Fifth Circuit merits review for several reasons. First, in finding that Mr. Randall was a longshoreman, the Fifth Circuit has placed itself in direct conflict with the opinion of the Eleventh Circuit in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 688 (1991). Second, the Fifth Circuit erroneously interpreted this Court's decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983), by failing to give effect to the language of the opinion requiring that a "maritime employee" perform his employment duties on navigable waters. Third, the holding below fails to carry out Congress' intent that longshore status not be solely dependent on what the employee is doing at the moment of injury. Fourth, this Court has raised this precise issue on two prior occasions without resolving the question presented.

I. AN EXCLUSIVELY LAND-BASED WORKER WHO IS FORTUITOUSLY INJURED ON NAVIGABLE WATERS DOES NOT MEET THE "STATUS" REQUIREMENT OF THE LHWCA.

On five occasions since 1976, this Court has considered the effect of the 1972 amendment to the LHWCA, which added a "status" component to the coverage requirement

of the Act. Prior to 1972, all persons injured beyond the *Jensen* line upon navigable waters were covered by the statute regardless of their duties.[10] By contrast, admittedly maritime workers injured on dry land fell outside the scope of the Act. In 1972, Congress sought to remedy this anomaly by broadening the geographic coverage of the Act to include piers, docks and other adjoining areas. However, to prevent every person injured near navigable waters from becoming a covered employee, Congress added the requirement that only those persons engaged in "maritime employment, including any longshoreman or other person engaged in longshoring operations, and any other harbor worker including a shiprepairman, shipbuilder, and shipbreaker," would be covered. 33 U.S.C. § 902(3).

The aim of Congress in amending the Act was to expand, rather than restrict, coverage. Therefore, a threshold question posed by the amendment is whether a worker who was covered prior to 1972 would remain covered thereafter, notwithstanding the addition of a "status" requirement. In *Perini North River Associates, supra,* this Court held that, generally, workers who were previously covered remained covered notwithstanding the addition of the status requirement. However, in *Herb's Welding v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985), this Court refused to extend coverage to oilfield workers injured on fixed platforms in state territorial waters. In both of these cases, this Court raised, though left undecided, the precise issue presented here. In *Perini*, the Court expressed "no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters." *Id.* at 459 U.S. 324, n.34, 103 S.Ct. 651, at n.34. In *Gray*, the Court noted "a substantial

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[10] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Id.* at 470 U.S. 427, n.13, 105 S.Ct. 1429, n.13.

In the opinion below, the Fifth Circuit expressed difficulty with the language of the *Perini* opinion. In particular, the Fifth Circuit noted some possible ambiguity in the following section of the *Perini* opinion:

> "In holding that we can find no Congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon actual navigable waters, we in no way hold that Congress meant for such employees to receive LHWCA benefits merely by meeting the situs test, and without regard to the maritime employment language. We hold only that when a worker is injured upon actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, provided, of course, he is the employee of a statutory employer, and is not excluded by any other provision of the Act. We consider these employees to be engaged in maritime employment not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters."

459 U.S. at 323-24; 103 S.Ct. at 650-51.

In this case, the Fifth Circuit, following its earlier opinion in *Fontenot v. A.W.I., Inc.*, 923 F.2d 1127 (5th Cir. 1991), has held that since Mr. Randall was unquestionably "in the course of his employment" and killed in navigable waters, he satisfied both the status and situs tests for LHWCA coverage as defined by a literal interpretation of *Perini*. The panel expressed some reservations about this result since Mr. Randall was not "required to perform his employment duties upon navigable waters." Thus, the issue becomes whether the "status"

and "situs" requirements are conjunctive or disjunctive, or, stated differently, whether in addition to a maritime situs, the injured worker must also demonstrate that his work required him to perform services on navigable waters.

The lower courts are split on this issue. In *Brockington v. Certified Elec., Inc., supra*, the Eleventh Circuit held that a land-based electrician who was injured while riding aboard a skiff used to ferry him along the Intracoastal Waterway to a jobsite located on an island off the coast of Georgia fell outside the ambit of the LHWCA. In *Brockington*, the district court found that status depends not on what the employee is doing at the moment of injury, but rather on the nature of the employment in which the employee is generally engaged. Since Brockington's duties consisted of wiring commercial buildings, he could not be a "maritime employee." The Eleventh Circuit affirmed, adopting the district court's opinion.

Brockington relies heavily on the legislative history of the 1984 amendments to the Act.[11] The purpose of these amendments, in part, was to:

> . . . insure stability for both the employer and the employee. The employer needs to know its obligation with respect to workers' compensation for its employees and make plans accordingly. Employees should not fall within the coverage of different statutes because of the nature of what it is they were doing at the moment of injury.

H.Rep. 98-570, at p. 6, reported in 1984 *U.S. Code Congressional & Administrative News*, at 2739. Since Brockington unquestionably would have been a state compensation worker if injured while on the island at the jobsite, the Eleventh Circuit found that Congress intended that

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[11] In part, these amendments sought to further define a "maritime employee" by codifying certain exclusions for workers involved in clerical, security, and recreational activities.

he would remain a state compensation worker while riding on the vessel to his place of employment.

The Fifth Circuit has reached a contrary conclusion. In *Fontenot, supra*, a "wireline operator" was injured while aboard a crewboat that was being used to transport him ashore from his place of employment aboard an inland drilling barge.[12] The Fifth Circuit in *Fontenot* relied solely on the fact that he was injured while on navigable waters, reciting the language of *Perini*, and observing that Fontenot satisfied *Perini* since he was injured on actual navigable waters while in the course of his employment. In so doing, *Fontenot* implicitly answers the question left open in both *Perini* and *Herb's Welding* in favor of a finding of LHWCA coverage.[13]

Sea Savage respectfully submits that *Fontenot*, as well as the panel opinion in this case, erroneously and literally interpret this Court's decision in *Perini*. Likewise, these holdings frustrate Congress' express intent to determine longshore status by the employee's general duties rather than his location at the moment of injury. Although the *Perini* opinion states that a maritime situs is all that is required if the injury occurs during the course and scope of the employee's work, this Court made clear its reasoning; these type workers are considered maritime employees not only because they are injured in a maritime locale, but, also, because they are "required to perform their employment duties upon navigable waters." *Id.* at 324, 103 S.Ct. at 651. Mr. Randall clearly performed all of his work on a fixed platform, and was upon actual navigable waters only during transit to and from the platform. By finding that Mr. Randall was within the scope of LHWCA coverage, the Fifth Circuit has effectively removed any requirement that an injured worker's actual

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[12] A "wireline operator" injects long strands of coil tubing down oil wells to help maintain their production.

[13] The *Fontenot* opinion does not discuss either the earlier opinion in *Brockington* nor the legislative history of the act.

employment be connected with either traditional maritime activity or commerce.

The reasoning of both *Fontenot* and the opinion below improperly expand the scope of LHWCA coverage. This Court has observed that the "maritime employment" test for LHWCA status is an occupational rather than a geographic test. *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 79, 100 S.Ct. 328, 335, 62 L.Ed.2d 225 (1979). The test developed by the Fifth Circuit in *Fontenot* and in the opinion below transforms that test, in the case of offshore oil workers, into nothing more than a geographic inquiry.

The result achieved below entails the undesirable result of having workers move in and out of the coverage of the Act solely dependent upon where they are at the moment of injury. By enacting the 1972 amendments to the Act, among the primary Congressional intents was to insure LHWCA status for those workers engaged in traditional longshoring activities whose work time was spent primarily on land. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Prior to 1972, only when such workers were injured seaward of the *Jensen* line were they afforded the protection of the Act. Thus, Congress clearly intended that a worker should, at all times, fall either within or without the coverage of the Act. The legislative history of the 1984 amendments makes this abundantly clear:

> ". . . The committee firmly believes that the situation in which a worker may be covered at one time, and not covered at another, depending upon the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments."
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> H.Rep. No. 98-570, at pp. 3-4, 1984 *U.S. Code Congressional & Administrative News,* at 2736-37.

This is precisely the result which has been reached by the Fifth Circuit in the present case. Under *Gray*, Mr. Randall, a mechanic, unquestionably fell outside the scope of LHWCA coverage while performing his duties on the West Delta P 27-1 structure. Like the claimant in *Brockington*, he was only over actual navigable waters during transit to and from his place of employment. However, the reasoning of the courts below would have one become a longshoreman for that small fraction of time spent riding as a passenger aboard vessels. Petitioner respectfully submits that this "dual status" is the "enormously destabilizing" result that Congress sought to eliminate in its most recent amendment to the Act. This potential for conflicting results is aptly demonstrated by the Fifth Circuit's recent decision in *Munguia v. Chervon U.S.A., Inc.*, 999 F.2d 808 (5th Cir. 1993). Munguia performed essentially the same job function as Theodore Randall. However, since he was injured on a fixed platform shortly after disembarking from a vessel, he was not covered by the Act since he was not injured on navigable waters. *Munguia* thus vividly illustrates the uncertainty Congress sought to prevent; the same employer may owe different benefits to two identical workers solely based on the location of the injury.

Mr. Randall's status as a longshoreman is not moot in the context of this litigation. The district court's resolution of the apportionment of fault and insurance issues resulted from the lower court's belief that Mr. Randall was a longshoreman. This status issue was central to the Randalls' claims against Chevron since under the Act, Chevron could only be held liable for negligence in its capacity as time charterer of the SEA SAVAGE. *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1339 (5th Cir. 1987), *cert. denied*, —— U.S. ——, 112 S.Ct. 274, 119 L.Ed.2d 201 (1992). By contrast, if Mr. Randall was a state compensation worker, Chevron was amenable to suit in any capacity, including liability for fault as a "platform

owner". *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841, 846-47 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979); *King v. Universal Electric Construction*, 799 F.2d 1073 (5th Cir. 1986).[14] Since, under *Ma-Ju*, the district court was obliged to consider only vessel related allegations against Chevron, no decision has ever been made on the extent to which Chevron's land-based fault in failing to timely evacuate the West Delta field contributed to Mr. Randall's death.[15] For this reason, Petitioners respectfully submit that, should this Court find that Mr. Randall was not a longshoreman, then a remand for further proceedings would be required to resolve all of the issues between the parties.

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[14] These decisions rely on the notion that the general maritime law pre-empts application of the exclusivity provisions of state compensation statutes. Since the district court found that admiralty jurisdiction existed in this case, the general maritime law wrongful death remedy would have been available to the survivors of Mr. Randall.

[15] See note 9, *supra*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted, and that this Court conclusively answer the question it has raised on two prior occasions dealing with the status of a worker transiently and fortuitously injured on navigable waters. Petitioners further request that this Court reverse the decision below as being contrary to Congressional intent by amending the Longshore and Harbor Workers' Compensation Act. Finally, Petitioners ask that the petition be granted in order to restore uniformity among the circuits by interpreting the Act to provide that a worker is either at all times within or outside the scope of the Longshore Act.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-9567

BARBARA S. RANDALL, On Her Own Behalf and as Personal Representative of the Estate of the Decedent, THEODORE F. RANDALL, JR., and on the Behalf of the Children, ROD ANTHONY RANDALL and HOLLY LEANN RANDALL,

Plaintiff-Appellee,

v.

CHEVRON U.S.A., INC., *et al.*,

Defendants,

SEA SAVAGE, INC.,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Louisiana

Feb. 11, 1994

Before KING and JOLLY, Circuit Judges and PARKER,* District Judge.

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* Chief Judge of the Eastern District of Texas, sitting by designation.

KING, Circuit Judge:

Theodore F. Randall, an employee of Chevron, U.S.A., Inc. ("Chevron"), drowned after unsuccessfully attempting a swing rope transfer from a fixed platform in the Gulf of Mexico to the M/V SEA SAVAGE. Randall's widow, Barbara Randall, brought suit individually, on behalf of Randall's estate, and on behalf of their children against Chevron and Sea Savage, Inc. ("Sea Savage"). The matter was tried to the court, and the court entered judgment against the defendants. This appeal followed.[1]

I.

Factual Background

This case arises from the tragic death of Theodore F. Randall, a mechanic employed by Chevron on its fixed platforms in the Gulf of Mexico. On July 31, 1989, Randall was on Chevron's West Delta Field Block 27 P-1 platform, a fixed structure located off the coast of Louisiana but within Louisiana territorial waters. At the time, a tropical storm was known to be approaching the West Delta area.

The M/V SEA SAVAGE was a 100-foot vessel owned and operated by Sea Savage and certified by the United States Coast Guard as a passenger vessel. Chevron entered into a time charter with Sea Savage on January 1, 1989, to obtain the services of the vessel in the operation of Chevron's platforms in the West Delta Block 27 oil field. The time charter provided that Sea Savage would man, operate, and navigate the vessel, while Chevron would assign the vessel its tasks. Sea Savage was required to provide liability insurance naming Chevron

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[1] After the parties filed their briefs, the Randalls settled with Sea Savage and its underwriters and assigned their claims to them. Thus, Sea Savage and its underwriters have taken the place of the Randalls on this appeal. As will be seen, however, they have not adopted all the legal positions taken by the Randalls at trial.

as an additional insured, and Sea Savage did in fact procure some $5,000,000 of protection and indemnity coverage naming Chevron as an additional insured.

At 2:30 a.m. on July 31, 1989, the SEA SAVAGE set out on its regularly scheduled cargo run in the West Delta field. Captain Dalton Parker was in command of the vessel. By 10:06 a.m., the tropical storm had been upgraded to a hurricane, and Chevron's operations manager ordered an evacuation of the West Delta field. Before proceeding to the P-1 platform, the SEA SAVAGE carried personnel to other platforms to secure them in preparation for evacuation. Several swing rope transfers to and from these platforms were safely accomplished. As weather conditions deteriorated, it became unsafe to make swing transfers to and from the smaller satellite platforms. Captain Parker testified that he requested to be released from further tasks in the field because he thought his mission had been completed. Jim Howell, the area foreman in the West Delta field, asked Captain Parker to proceed to West Delta Field Block 27 to provide any necessary assistance in the evacuation.

The SEA SAVAGE arrived at the P-1 platform at approximately 10:45 a.m. Witnesses estimated that the seas were between six and eight feet at the time and that the winds were some 35 miles per hour. Three workers, including Randall, were waiting to be evacuated. Captain Parker backed the SEA SAVAGE next to the platform and, following standard procedures, held the stern at an angle to the platform. Randall was the first to attempt the swing transfer. He grasped the swing rope and swung to the deck of the vessel. What happened next is not clear, but it appears that Randall landed on his feet as the vessel rose with a swell, causing the swing rope to go slack. Randall continued to hold onto the rope, and as the vessel fell with the waves the rope went taut. Randall was then pulled back off the vessel. Randall lost his grip on the rope and fell into the water.

Deckhand Paul Nash witnessed the episode and immediately ran some fifty feet to the rear of the SEA SAVAGE's pilothouse to retrieve the life ring. Captain Parker was aware of Randall's fall and immediately put the vessel into gear, moving the vessel forward and away from Randall. He testified that moving towards Randall would have risked sucking Randall into the propellers or crushing him against the platform. Randall, a strong swimmer, managed to swim to one of the platform's legs. He clung to the leg as best he could in the rough water for some twenty-five minutes. Efforts to save Randall with a life ring thrown from the SEA SAVAGE were unsuccessful. At last Randall let go of the platform, slumped over, and drowned. He floated out from under the platform and was recovered by deckhand Nash. His body was lacerated, apparently from being thrown against the barnacle-encrusted leg of the platform by the waves. The remaining Chevron employees were evacuated by helicopter.

Procedural History

On October 2, 1989, Barbara Randall, both individually and as personal representative of the estate of her deceased husband and their two children, commenced this action in the United States District Court for the Eastern District of Louisiana seeking wrongful death and survival damages under the Jones Act, 46 U.S.C.App. § 688, and the general maritime law against Chevron and the SEA SAVAGE. Sea Savage filed a complaint for exoneration from or limitation of liability, claiming it was entitled to limit its liability to the value of the SEA SAVAGE and her pending freight. On January 25, 1990, this matter was consolidated with the Randall lawsuit for trial. Chevron answered and filed a cross-claim against Sea Savage seeking indemnification, costs, and attorneys' fees in connection with the Randall lawsuit. Chevron aiso filed a thirty-party complaint against the underwriters supplying the insurance coverage to Chevron as an

additional insured pursuant to Chevron's time charter with Sea Savage.

On March 30, 1990, Chevron moved for summary judgment on plaintiff's Jones Act and punitive damages claims. By minute entry dated July 26, 1990, the district court dismissed the Jones Act claims, finding that Randall could not be considered a Jones Act seaman because he was never assigned to any vessel and worked exclusively on fixed platforms. The court did not dismiss plaintiff's general maritime or punitive damages claims.

On March 26, 1991, Chevron moved for partial summary judgment, arguing that the court should dismiss all of the plaintiff's claims except for those claims stated under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and/or the exclusive remedy provisions of the Louisiana Workers' Compensation Statute. Barbara Randall and Sea Savage opposed Chevron's motion. Following oral argument on October 30, 1991, the district court found "that Mr. Randall was a longshoreman or harbor worker within the meaning of the Longshore and Harbor Workers' Compensation Act."[2] The district court also granted the underwriters' motions to dismiss Chevron's claims against them prior to trial on the ground that the insurance policies naming Chevron as an additional insured did not cover the claims being asserted against Chevron.

The bench trial commenced on November 12, 1991. At the conclusion of the trial on November 14, 1991, the

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[2] Strangely, the pre-trial order filed on November 5, 1991 listed as a contested issue of law "[w]hether Louisiana, General Maritime and/or LSHWA Law applies" ("LSHWA" being another acronym occasionally used in lieu of "LHWCA"). However, after judgment was entered in favor of Mrs. Randall, the district court reiterated that it had "previously held that Mr. Randall was covered by the Longshore and Harbor Worker's Compensation Act." *Randall v. Chevron U.S.A., Inc.*, 788 F.Supp. 1391, 1337 (E.D.La. 1992).

district court rendered oral reasons for judgment from the bench. The court found Sea Savage and the crew of the SEA SAVAGE 75% liable in causing the accident. Among other things, the district court found that Sea Savage was negligent in failing to train the captain and crew of the SEA SAVAGE properly in life-saving procedures, in failing to place a life ring near the jump station of the vessel, and for the failure of the SEA SAVAGE's captain and crew to follow accepted rescue procedures after Randall fell into the water. The court further held that Sea Savage was not entitled to its requested limitation of liability because of its failure to properly train the captain and crew of the vessel, to require drills in rescue procedures, and to ensure that the captain was competent. The court held Chevron 25% liable for directing the vessel to remain in and encounter the treacherous weather conditions that then existed.

With respect to damages, the district court made the following awards to the Randalls: $66,726 for past lost wages; $309,177 for lost future support; and $30,395 for loss of personal services. Under the heading of "loss of society" damages, the court awarded $300,000 to Mrs. Randall, $100,000 to Randall's adult son Rod Randall, and $150,000 to Randall's daughter Holly Randall. The court awarded $1,000,000 for Randall's pain and suffering and $3,897 for funeral expenses. The claim for punitive damages was denied.

The district court took under advisement Chevron's claim against Sea Savage for contractual indemnity. By minute entry filed February 19, 1992, the district court ruled that Chevron was entitled to contractual indemnity from Sea Savage under the terms of the time charter. This decision is reported as *Randall v. Chevron U.S.A., Inc.*, 788 F.Supp. 1391 (E.D.La.1992). The district court based its decision on the holding that Chevron's liability arose in its capacity as time charterer of the vessel, thus coming within the indemnity provision in the

time charter. *Id.* at 1395. Chevron had also moved post-trial for reconsideration of the dismissal of its claims against the underwriters for insurance coverage, and on March 16, 1992, the district court ruled that the plaintiff's claims against Chevron did come within the insurance coverage provided to Chevron by the underwriters. This decision is reported as *Randall v. Chevron U.S.A., Inc.*, 788 F.Supp. 1398 (E.D.La.1992).

On March 19, 1992, judgment was entered in favor of Chevron for indemnity and insurance coverage. The district judge referred the issue of the appropriate amount of costs and attorneys' fees to award Chevron to a magistrate judge. On July 7, 1992, the district court found that the fees and expenses incurred by Chevron in defending the plaintiff's claims were fair and reasonable and awarded reimbursement for those fees. The court denied reimbursement, however, for those fees and expenses spent in defense of the punitive damages claim.

After the notices of appeal and briefs were filed, Sea Savage and its various insurance underwriters entered into a settlement agreement with the plaintiff on April 22, 1993, which included a complete assignment of all plaintiff's claims in this matter to Sea Savage and its underwriters. Thus, Sea Savage and its underwriters now stand in the place of Mrs. Randall vis-a-vis Chevron.[3]

II.

Standard of Review and Choice of Law

This court accepts the factual findings of the district judge unless they are clearly erroneous. However, we may review de novo a district court's conclusions of law, *Halferty v. Pulse Drug Co.*, 864 F.2d 1185, 1188 (5th Cir.1989). Interpretation of the indemnity clause that is involved in this action presents a matter of law that is

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[3] According to Sea Savage, the only issue mooted by the settlement is Sea Savage's claim before the district court that it was entitled to limit its liability as vessel owner.

reviewable de novo on appeal. *Smith v. Tenneco Oil Co.*, 803 F.2d 1386, 1388 (5th Cir.1986) (citing *Kemp v. Gulf Oil Corp.*, 745 F.2d 921, 924 (5th Cir.1984)). District court interpretations of insurance policies are also reviewed de novo. *Harbor Ins. Co. v. Urban Constr. Co.*, 990 F.2d 195, 199 (5th Cir.1993).

Construction of maritime contracts is governed by federal maritime law. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir.1986). Although federal law governs the interpretation of marine insurance contracts, we apply the law of the state where the marine insurance contract was issued and delivered if there is no federal law, legislative or judicial, relating to the question. *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir.1985).

III.

A. *Was Randall a "maritime employee" within the meaning of the LHWCA?*

The first issue presented for our decision is whether the district court correctly held that Randall was a "maritime employee" and thus that his widow was entitled to proceed under the LHWCA rather than under Louisiana's workers' compenstation statute. Both Chevron and Sea Savage argue that the district court erred and that Randall was not covered by the LHWCA. Mrs. Randall, before she settled out of this case, argued the opposite position.[4]

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[4] The threshold determination of whether Randall was covered by the LHWCA may have an impact on the outcome of several other issues in this case. The availability of loss of society damages may depend on whether or not Randall was a longshoreman. Sea Savage, although it now stands in Mrs. Randall's shoes for our purposes, has chosen to continue to argue against LHWCA coverage in the apparent belief that reversal on this issue would necessitate a remand for redetermination of its and Chevron's comparative negligence. We note, however, that the district court

A brief overview of the LHWCA is in order. The coverage section of the LHWCA provides that compensation shall be payable upon the disability or death of an employee "if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). With certain exclusions not relevant to the instant case, the term "employee" is defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." *Id.* § 902(3). As a general rule, the LHWCA imposes liability for benefits payable to an injured worker upon the employer. *Id.* § 904(a). This is the exclusive liability of the employer *qua* employer, so the employer is generally immune from the injured worker's potential tort suits. *Id.* § 905(a). The specific benefits to which the injured longshoreman is entitled are defined in the LHWCA. *Id.* §§ 907-09.

Prior to 1972, a worker covered by the LHWCA who was injured while loading or unloading a ship was entitled both to compensation payments and to judgment against the shipowner if the injury was caused by the ship's unseaworthiness or negligence. *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 164, 101

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apportioned 100% of the liability between Chevron in its capacity as "vessel" and Sea Savage, suggesting that Chevron was not liable in any other capacity and that no reapportionment of negligence would be necessary. Chevron argues against LHCWA coverage in the apparent belief that Louisiana workers' compensation law would provide the exclusive remedy to the Randalls should we decide that the LHWCA does not apply. *But see Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 846-47 (5th Cir.1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979). We express no view on the merits of these various arguments.

S.Ct. 1614, 1620, 68 L.Ed.2d 1 (1981). Section 905(b) of the LHWCA, added in the 1972 amendments to that statute, abolishes the injured longshoreman's unseaworthiness claim but preserves his right to recover for the "negligence of a vessel." 33 U.S.C. § 905(b); *Scindia*, 451 U.S. at 165, 101 S.Ct. at 1621; *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1264 (5th Cir.), *cert. denied*, 479 U.S. 854, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986). The term "vessel" in this context includes the vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member. *Id.* § 902(21). Thus, "[w]hen an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued 'qua vessel' for acts of vessel negligence." *Levene v. Pintail Enters., Inc.*, 943 F.2d 528, 531 (5th Cir.1991) (citing *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 532, 103 S.Ct. 2541, 2548, 76 L.Ed.2d 768 (1983); *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1339 (5th Cir.1987)), *cert. denied*, —— U.S. ——, 112 S.Ct. 2274, 119 L.Ed.2d 201 (1992).

The issue of whether Randall's accident is one covered by the LHWCA turns on whether he satisfies the two-pronged test set forth in that statute. First, his injury must have occurred at a covered location or "situs." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed.2d 406 (1985). Second, he must meet the "status" test of being a person engaged in "maritime employment," a term not defined by the LHWCA. *Id.* The "status" test is the source of difficulty in the instant case.

Our analysis of the "status" issue begins with the Supreme Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 63 L.Ed.2d 320 (1977). In that case, plaintiff Carmelo Blundo was employed as a "checker," or one responsible for checking and recording cargo as it was loaded onto or unloaded

from vessels, barges or containers. *Id.* at 252-53, 97 S.Ct. at 2351-52. While working on a pier, Blundo slipped on some ice and was injured. *Id.* at 253, 97 S.Ct. at 2352. Plaintiff Ralph Caupto was a member of a longshoring "gang," and he was injured while loading a truck with cargo that had been discharged from a vessel. *Id.* at 254-55. The Court held that both plaintiffs satisfied the "status" test under the LHWCA, Blundo because his task was "an integral part of unloading process" and Caupto because "he was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck." *Id.* at 256, 271-72, 103 S.Ct. at 2353, 2361. Thus, as it would in future cases, the Court focused on the nature of the workers' employment and its connection with the loading and unloading of vessels as a key issue in deciding whether the "status" test was met.

The next case in which the Supreme Court addressed the "status" test was *Director, Office of Workers' Compensation Programs v. Perini N. River Assocs.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). The injured worker in *Perini,* Raymond Churchill, was employed in the construction of a sewage treatment plant extending over the Hudson River. *Id.* at 300, 103 S.Ct. at 638. His job was to supervise operations on a cargo barge, and he was injured while standing on the deck of the barge. *Id.* The Court held that Churchill, as an employee injured upon navigable waters in the course of his employment, could meet the "status" test without showing that his employment possessed a direct or substantial relation to navigation or commerce. *Id.* at 318-19, 103 S.Ct. at 647-48. Although the Court expressly recognized that "the status requirement is occupational and the situs test is geographic," *id.* at 324 n. 32, 103 S.Ct. at 651 n. 32, it went on to hold that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status require-

ment," assuming that the other requirements of the LHWCA are met. *Id.* at 324, 103 S.Ct. at 651. The Court emphasized that such workers are "engaged in maritime employment" both because they are injured in historically maritime locales and because they are required to perform employment duties upon navigable waters. *Id.* Finally, the Court expressed no opinion on the issue of "whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters." *Id.* at 324 n. 34, 103 S.Ct. at 651 n. 34. Under *Perini,* then, a special "status" test applies to workers who are injured while upon actual navigable waters: such a worker satisfies the "status" test simply by showing that he was injured on actual navigable waters in the course of his employment on those waters. *Id.* at 324, 103 S.Ct. at 651.

The Court again considered the contours of the "status" test in *Herb's Welding,* in which a welder employed on a fixed offshore platforms are legally equivalent to islands, form and sought LHWCA benefits. *Herb's Welding,* 470 U.S. at 416, 105 S.Ct. at 1423. The Court held that the welder, Robert Gray, was outside the *Perini* rule because fixed offshore platforms are legally equivalent to islands, *id.* at 422 & n. 6, 105 S.Ct. at 1426, and thus Gray was not "injured on navigable waters." *Id.* at 424-25 n. 10, 105 S.Ct. at 1428 n. 10. Gray was thus required to meet a different test, adumbrated by *Caputo,* based on whether Gray's employment had some connection with the loading, unloading, repair, or construction of ships. *Id.* at 423-24, 105 S.Ct. at 1427-28. As the Court recounted at length,

> Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks. . . . He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime

> about those tasks. They are also performed on land, and their nature is not significantly altered by the maritime environment, particularly since the exploration and development of the Continental Shelf are not themselves maritime commerce.

Id. at 425, 105 S.Ct. at 1428 (footnote omitted). Because Gray could not meet the "status" test, the Court held that Gray was excluded from LHWCA coverage without addressing the "situs" test. *Id.* at 427, 105 S.Ct. at 1429. Again the Court expressly reserved the issue of whether the LHWCA applies to a worker injured while "transiently or fortuitously" upon navigable waters, although it noted in passing a "substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Id.* at 427 n. 13, 105 S.Ct. at 1429 n. 13.

The instant case falls within that grey area left open for later decision by the Supreme Court in *Perini* and *Herb's Welding*. Chevron and Sea Savage argue that the circumstances of Randall's death place him outside the LHWCA's ambit under *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991), and *West v. Chevron U.S.A., Inc.*, 615 F.Supp. 377 (E.D.La. 1985). Mrs. Randall, on the other hand, argued that this court's decision in *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir.1991), compels the conclusion that Randall was covered by the LHWCA. We turn to the *Fontenot* case first, as we are constrained to follow indistinguishable decisions by other panels of our court absent an intervening precedent by our court sitting en banc or by the Supreme Court. *Campbell v. Sonal Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n. 8 (5th Cir.1992).

In *Fontenot*, the plaintiff, Joseph Fontenot, was a "wireline operator" employed by an oil field service company as a "pipe recovery specialist." *Fontenot*, 923 F.2d

at 1128. He testified that he spent roughly equal amounts of time working on shore, on fixed platforms, and on oil exploration and production vessels. *Id.* Returning to shore from an inland barge rig located in Louisiana state waters, Fontenot was injured while unloading his equipment from the deck of a crewboat onto the dock. *Id.* The parties agreed that Fontenot satisfied the "situs" test for LHWCA coverage, because he was on the crewboat and thus the navigable waters of the United States when he was injured, but Fontenot, desiring to pursue claims potentially more favorable than those available under the LHWCA, argued that he did not satisfy the "status" prong of the *Herb's Welding* test. *Id.* at 1129. The court held that Fontenot was a covered employee, applying the *Perini* test rather than the *Herb's Welding* test because Fontenot was injured while upon actual navigable waters in the course of his employment. *Id.* at 1133. Mrs. Randall argued that *Fontenot* is squarely on point, and that her husband's accident was covered by the LHWCA. Chevron argues that *Fontenot* is distinguishable.

We believe that *Fontenot* answers, although only implicitly, the question left open in *Perini* and *Herb's Welding* in favor of LHWCA coverage for the worker injured while transiently or fortuitously on actual navigable waters. The *Fontenot* court relied on *Perini* in reaching the conclusion that Fontenot came within the ambit of the LHWCA, stating,

> [I]f the employee was injured while on actual navigable waters, in the course of his employment, then he is engaged in maritime employment and satisfies the status test under *Perini*. . . .
>
> In this case, Fontenot injured himself while on the crewboat. The crewboat was docked in actual navigable waters. Therefore, under [*Perini*], Fontenot, at the time of his injury, satisfied the *status* requirement of the LHWCA.

Id. at 1130 (emphasis added). We have some difficulty with this analysis, specifically in the *Fontenot* court's conspicuous omission of the "in the course of his employment" element of *Perini* in its application of *Perini* to Fontenot's case. Part of the difficulty, however, stems from the language of *Perini* itself. In one passage in *Perini,* the Supreme Court strongly suggested that even workers who are injured on navigable waters are required to show that "they are required to perform their employment duties upon navigable waters." *Perini,* 459 U.S. at 324, 103 S.Ct. at 651 (footnote omitted); *see also Herb's Welding,* 470 U.S. at 424 n. 10, 105 S.Ct. at 1428 n. 10 (pointing out that *Perini* was "carefully limited" to coverage of an employee injured while performing his job upon actual navigable waters). Yet, at the same time, the *Perini* Court insisted that the addition of the "status" test to the LHWCA by the 1972 Amendments did not diminish the LHWCA's traditionally broad coverage of workers injured on actual navigable waters. *Perini,* 459 U.S. at 315, 323-24, 103 S.Ct. at 646, 650-51; *see also* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 428 (2d ed. 1975) (observing that, at least before the 1972 Amendments, "[w]orkers who are not seamen but who nevertheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment' ").

Had the *Fontenot* court relied on the fact that Fontenot was employed on vessels, i.e., on actual navigable waters, some thirty percent of the time as well as on the day of his accident, its holding would be within the *Perini* rule. Instead, the court chose to rely solely on the situs of Fontenot's injury:

> The Court [in *Herb's Welding*] did not address the status of an oil field employee injured while in transit on navigable waterways, or one who spent a substantial period of his time working on drilling vessels, rather than fixed platforms.

> This case presents both issues. Fontenot injured himself while on a vessel in navigable waters. And Fontenot spent thirty percent of his time working on oil production vessels, and was returning from a job on such a vessel when he injured himself. We hold that *the first fact* satisfies the status test for coverage under the LHWCA, and address *but leave open* the question of whether the second would satisfy the status test.

Id. at 1130 (emphasis added). We understand "the first fact" to be the fact that "Fontenot injured himself while on a vessel in navigable waters." *Id.* By holding that the occurrence of an injury on actual navigable waters satisfies the "status" test, the *Fontenot* court answered the question of whether LHWCA coverage extends to workers injured while transiently or fortuitously upon actual navigable waters in the affirmative.

Chevron's reliance on the concurring opinion in *Fontenot* is understandable but ultimately futile. The concurring judge asserted that the court was not reaching the case "of injury in transit on navigable waters of a worker on fixed platforms." *Id.* at 1134 (Higginbotham, J., concurring). The concurrence also suggests that the court's holding is based in part on Fontenot's employment on vessels and the fact that he was injured while returning from a vessel. *Id.* (Higginbotham, J., concurring). We cannot agree. The passages from the court's opinion quoted *supra* make it clear that the court relied solely on the fact that Fontenot was injured on navigable waters in finding LHWCA coverage. *See also id.* at 1132 ("Because he was on 'navigable waters', as that term was defined prior to the 1972 Amendments to the LHWCA, Fontenot, satisfied both the status and situs tests."). The court thus went beyond a mere application of *Perini* and decided the question left open in that case and in *Herb's Welding:* in this circuit, workers injured while transiently or fortuitously upon actual navigable waters are

covered by the LHWCA. We are bound to follow the *Fontenot* court's determination.[5]

Applying *Fontenot* to the instant case, we think it beyond cavil that Randall was injured "on navigable waters" within the meaning of *Perini* and the LHWCA. The accident occurred during Randall's attempt to return to shore. The instant case is thus on all fours with *Fontenot*, and we must therefore conclude that Randall was covered by the LHWCA.

B. *Apportionment of Fault*

1. *Time Charterer Liability*

We next consider the district court's appointment of liability between Chevron and Sea Savage. The court apportioned fault because, under § 905(b) of the LHWCA, a longshoreman injured by the negligence of a "vessel" is entitled to bring an action against that vessel. The court determined that Chevron constituted a "vessel" because the term "vessel" is defined by the LHWCA to include not only the vessel's owner but also a "charter or bare boat charterer." 33 U.S.C. § 902(21). Thus a time charterer may be liable under § 905(b) if the cause of the harm is "within the charterer's traditional sphere of control and responsibility or has been transferred thereto by the clear language of the charter agreement."

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[5] *Fontenot*'s interpretation of the LHWCA conflicts with that of the Eleventh Circuit. In *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1528 (11th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991), the court held that an electrician whose employment was entirely landbased but who was injured while riding in a motorboat to an island jobsite was not covered by the LHWCA. The court's remark that Brockington's "only connection with the water was the fact that he happened to be traveling over it *incidental* to land-based employment," *id.*, is equally true of Randall. Nevertheless, *Fontenot* remains binding precedent in this circuit and must be followed unless changed by a decision of this court en banc or the United States Supreme Court, or by future amendments to the LHWCA itself.

Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc., 830 F.2d 1332, 1343 (5th Cir.1987); *see also Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1041-42 (5th Cir.1983) (holding that a time charterer could be liable under § 905(b) of the LHWCA for ordering a worker to unload equipment from a vessel to a platform during rough weather); *cf.* 2 Alex L. Parks, *The Law and Practice of Marine Insurance and Average* 884-85 (1987) ("[The body of law governing time charterer liability in § 905 (b) cases] is just now developing; it is confusing and it is inconclusive.").

We begin by noting that the LHWCA casts a wide net in defining parties potentially liable in the event of injury caused by vessel negligence. The statute provides that

> Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 902(21). Nothing in the statute suggests that a finding that negligence was committed by one entity defined as a "vessel" in § 902(21), such as the vessel's owner, precludes a finding that another such entity, such as a charterer, was also contributorily negligent. Indeed, holding each such entity liable in proportion to its degree of fault advances the purpose underlying the LHWCA, which is to provide longshoremen with the benefits of workers' compensation without depriving them of the right to be compensated for their injuries caused by the negligence of third paries or eliminating the incentive for third parties to provide longshoremen with a safe place to work. *Perez v. Arya Nat'l Shipping Line, Ltd.*, 468 F.Supp. 799, 802 (S.D.N.Y.1979), *aff'd mem.*, 622

575 (2d Cir.1980), *aff'd sum nom. Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981). It is also beyond dispute that time charterers are among those third parties included in the definition, although they are not specifically mentioned. *Kerr-McGee Corp.*, 830 F.2d at 1338.

Chevron argues that there was no evidence that it was negligent in its capacity as time charterer of the SEA SAVAGE. In his oral findings, the district judge found Chevron negligent for "direct[ing] the vessel to remain in, and to encounter the treacherous weather conditions that existed in the Gulf." Chevron argues that there is no duty on the part of a time charterer to determine whether the missions it assigns can be accomplished safely. In Chevron's view, this duty rests solely with the vessel captain unless specific contractual provisions shift duties onto the time charterer. Sea Savage takes the opposite position, arguing that the district court correctly held that a time charterer may be held liable for damages that result from directing a vessel to encounter dangerous natural conditions.

Sea Savage cites several cases in its favor, beginning with the *Helaire* case cited above. In that case, Edmond Helaire was employed by Mobil as a roustabout and was ordered to unload casing onto a fixed platform from a supply vessel during rough weather. *Helaier,* 709 F.2d at 1032-33. He slipped and injured his knee, *id.* at 1034, and sued both Mobil, which was the time charterer of the vessel, and the vessel owner under the LHWCA. In a jury trial, Mobil was found 100% liable and the vessel owner was exonerated, and the district court granted Mobil recovery from the vessel owner's underwriters pursuant to protection and indemnity insurance that named Mobil as an additional insured. *Id.* Mobil and the underwriters then engaged in a dispute over whether Mobil's negligence had been committed in its capacity as platform owner or as time charterer. *Id.* at 1041. We held that

the district court properly predicated Mobil's negligence on its actions as time charterer, based on Mobil's acts or omissions in permitting the unloading of cargo from the vessel to continue "despite the obvious danger created by the poor weather conditions." *Id.* at 1042.

There are other precednts for the district court's assignment of fault to Chevron as time charterer. In *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 378 (5th Cir.1987), Chevron had time chartered the M/V STAR II to service equipment in the Gulf. Chevron dispatched the STAR II into the Gulf at a time when it was aware of a forecast of dangerous weather conditions, and the vessel capsized, killing one and injuring three others. *Id.* at 387, 378. The district court found that Chevron's negligence as time charterer in failing to inform the vessel's captain of the weather forecast and in dispatching and failing to recall the vessel was 30% responsible for the injuries and losses sustained. *Id.* at 387. We affirmed this finding. *Id.* Likewise, in *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 646-47 (5th Cir.1989), in which two vessels collided, we affirmed a finding that Chevron as time charterer was liable for its negligence in ordering the captain of one vessel to operate his vessel at high speeds in heavy fog. *See also Kerr-McGee Corp.*, 880 F.2d at 1341 ("The time-charterer directs where and when the vessel will travel, so if it forces it out in hurricane weather or similarly treacherous conditions, it may be liable under section [905(b) of the LHWCA].").

Chevron counters by referring this court to our decision in *M.O.N.T. Boat Rental Servs., Inc. v. Union Oil Co.*, 613 F.2d 576 (5th Cir.1980). In that case, Union Oil chartered the vessel BOBBY O from M.O.N.T. to transport personnel and supplies off the coast of Nicaragua. *Id.* at 577. A crew member was injured after the BOBBY O put to sea on Union Oil's orders, and he recovered against M.O.N.T. under a claim of Jones Act negligence. *Id.* at 577-78. M.O.N.T. then sued Union

Oil, and the district court dismissed. We affirmed, first noting that the time charter contained the usual understanding that the vessel captain could refuse to carry out tasks without breaching the charter if his refusal was based on a good faith belief that the task was unsafe. *Id.* at 578. Thus, we held that, if Union Oil's order was at all negligent, it could not be "active or primary negligence relative to M.O.N.T.'s negligence in bringing about [plaintiff's] injuries." *Id.* at 581-82. Thus, M.O.N.T. was not entitled to tort indemnity from Union Oil. *Id.* at 582.

Chevron also directs our attention to *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d 416 (5th Cir. 1986). The time charterer in that case ordered a vessel to deliver personnel to a platform in rough seas. *Id.* at 418. Just before leaving the vessel, the plaintiff, Ronald Smith, slipped and fell. *Id.* He sued several parties, including the time charterer of the boat (his employer, McMoran Offshore Exploration Co.), and the trial court ruled in favor of McMoran. *Id.* at 419. We affirmed, holding that Smith could not recover from McMoran on the theory that McMoran was responsible for any injuries occurring as a consequence of its decision to transport workers by crewboat, because the ultimate decision about whether to proceed rested with the crewboat captain. *Id.* However, we also agreed with the trial court that "the decision to proceed by crewboat was not unreasonable." *Id.*

The trend of our more recent decisions, as demonstrated by Sea Savage, plainly favors imposing a duty of care on a time charterer who orders the vessel he has hired to put to sea in dangerous weather. We distinguished *M.O.N.T. Boat Rental* in *Graham*, noting that *M.O.N.T. Boat Rental* "implicitly recognizes that there is a distinction between a time charterer's potential liability under the time charter and independent tort liability which is not governed by the time charter." *Graham*, 824 F.2d at 388. Additionally, the concepts of active and passive

negligence have fallen by the wayside with the advance of the comparative negligence doctrine. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 n. 13 (5th Cir.1992); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 500-02 (5th Cir.1982). The force of the language in *Smith* suggesting that the time charterer was not responsible for injuries resulting from sending the vessel into rough seas is undercut by that court's agreement with the district court that the time charterer's decision was "not unreasonable." *Smith,* 791 F.2d at 419.

We think it clear that a time charterer may breach its duty of care if it "forces [the vessel under charter] out in hurricane weather or similar treacherous conditions." *Ker-McGee Corp.*, 830 F.2*d* at 1341; *see also Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 791-92 (5th Cir. 1992); *Graham,* 824 F.2d at 388; Helaire, 709 F.2d at 1041-42. The district court was correct to hold that Chevron could be held negligent in its capacity as time charterer and that such negligence was negligence committed as a "vessel" within the meaning of the LHWCA.

2. *Sufficiency of the Evidence*

Sea Savage argues that it was clearly erroneous for the district court to assign 75% of the liability for Randall's death to Sea Savage. Specifically, Sea Savage contends that the district court should have assigned more than 25% of the liability to Chevron for its role in ordering the evacuation of the platform by vessel instead of by helicopter, and that the district court should have found Randall himself contributorily negligent.

We reject both of Sea Savage's contentions. There was ample evidence to support the district court's assignment of 75% of the fault to Sea Savage, based on the acts and omissions of the crew of the SEA SAVAGE. We list only a few of the pertinent factual findings by the district court, all of which were supported by the evidence. The captain of the SEA SAVAGE failed to post any crew

members near the stern of the vessel where platform personnel would be boarding, despite the rough weather conditions. No life ring was easily accessible at the stern of the vessel, and to retrieve a life ring deckhand Nash had to leave the stern of the vessel, run approximately fifty feet to the rear of the pilothouse (impeded by an obstructing hatch), and return to the stern of the vessel. Without determining Randall's whereabouts, the captain put the vessel into gear and moved away, thereby pushing Randall so far from the vessel that Nash could not throw him the life ring. The district court also cited several other departures from man overboard procedures posted on the SEA SAVAGE, as well as the failure of Sea Savage to train the vessel's crew properly in rescue procedures. The apportionment of 75% of the liability to Sea Savage and only 25% to Chevron for its role in ordering the evacuation was not clearly erroneous.

Neither was it clearly erroneous for the district court to assign no fault to Randall himself. There was eyewitness testimony that Randall's swing was not improperly done. Because the SEA SAVAGE began to move away from Randall as soon as he fell overboard, his decision to swim beneath the platform and cling to its legs for support could be found to be reasonable under the circumstances. We find no error in the district court's apportionment to fault in this case.

C. *Damages*

Chevron challenges two elements of the district court's damages award. First, Chevron argues that it was clear error for the district court to award $1,000,000 for Randall's pain and suffering. Second, Chevron argues that the district court's award of loss of society damages was improper under the LHWCA.

1. *Pain and Suffering*

A trial judge's assessment of damages is a finding of fact and is reviewed under the clearly erroneous standard. *Wheat v. United States,* 860 F.2d 1256, 1259 (5th Cir. 1988); *Sosa v. M/V Lago Izabal,* 736 F.2d 1028, 1035 (5th Cir.1984). In the context of jury verdicts, we have held that an award is disproportionate to the injury sustained if it is so large that it shocks the judicial conscience or indicates passion, prejudice, corruption, bias, or another improper motive. *Wellborn v. Sears, Roebuck & Co.,* 970 F.2d 1420, 1427 (5th Cir.1992). If we determine that an award is disproportionate to the injury, we will order a remittitur in accordance with the maximum recovery rule, which mandates that the award be reduced to the maximum amount the jury could properly have awarded. *Id.* at 1427-28.

After careful consideration, we conclude that the $1,000,000 award for Randall's pain and suffering must be reduced to $500,000. We recognize that "[o]ur reassessment of [pain and suffering] damages cannot be supported entirely by rational analysis, but is inherently subjective, involving experience and emotions as well as calculation." *Dixon v. International Harvester Co.,* 754 F.2d 573, 590 (5th Cir.1985). Randall's pain and suffering, although extreme, was mercifully brief. The district court's award of $1,000,000 translates into $40,000 per minute of pain and suffering, or almost $60,000,000 per day. In the *Sosa* case, we suggested that $1,000,000 approached the maximum amount that could be awarded to a burn victim who sustained severe burns over eighty percent of his body and who would endure discomfort and disability for the rest of his life. *Sosa,* 736 F.2d at 1035. Likewise, in *Stratis v. Eastern Air Lines, Inc.,* 682 F.2d 406 (2d Cir.1982), the court reversed a $1,200,000 pain and suffering award to a plane-crash victim who spent forty-two days in a hospital burn unit and emerged a quadriplegic. *Id.* at 415 (noting that "in anyone's cal-

culations [an award of approximately $29,000 per day] has to be excessive").

The instant case is distinguishable from *Wellborn,* in which we affirmed a $1,000,000 award for pain and suffering to the estate of a fourteen year-old boy who died after being pinned beneath an automatic garage door. *Wellborn,* 970 F.2d at 1422-23, 1428, Randall clearly suffered no more than roughly twenty-five minutes, while the evidence in *Wellborn* showed that the decedent could have been alive and conscious for up to several hours while pinned beneath the door. *Id* at 1428. Additionally, Randall was a mature adult rather than a young child. We do not find *Wellborn* to be controlling.

We believe that $500,000 for Randall's pain and suffering would be reasonable. Should Sea Savage, now the real party in interest (see note 1, *supra*), refuse to accept the reduction of the pain and suffering award, it will be entitled to a new trial on damages alone. *Dixon,* 754 F.2d at 590.

2. *Loss of Society*

We next address Chevron's challenge of the district court's awards for loss of society. Under his heading, the district court awarded $300,000 to Randall's widow, $100,000 to Randall's adult son Rod Randall, and $150,000 to Randall's daughter Holly Randall. It appears that both of Randall's children lived at home and that Rod Randall worked for his father. Chevron argues that non-pecuniary damages such as for loss of society are not available as a matter of law in the instant case. We disagree.

The availability of loss of society damages in maritime cases is an issue that has led the courts to weave an intricate web of case law. We begin our analysis with the seminal case of *Sea-Land Servs., Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). In

Gaudet, the Supreme Court held that the widow of a longshoreman could maintain a wrongful death action based on the death of her husband from injuries suffered while aboard a vessel in navigable waters, even though the decedent recovered damages during his lifetime for his injuries. *Id.* at 574-75, 94 S.Ct. at 809-10. The Court further held that compensation for loss of society is available in such cases. *Id.* at 585-90, 94 S.Ct. at 814-17. The Court eventually extended the *Gaudet* rule in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 276, 100 S.Ct. 1673, 1675, 64 L.Ed.2d 284 (1980), to allow recovery of loss of society damages by the spouse of a longshoreman who is injured but not killed.

In a case not involving longshoremen, however, the Supreme Court took a less expansive view of the remedies available under maritime law. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), the Court considered whether the survivors of a helicopter pilot who crashed in the Gulf of Mexico outside state territorial waters could recover loss of society damages. The Court held that they could not, noting that *Gaudet* applied only to coastal waters, while the *Higginbotham* case concerned an accident on the high seas and was governed by the Death on the High Seas Act (DOHSA), 46 U.S.C.App. § 762. *Id.* at 623-24, 98 S.Ct. at 2014. Because DOHSA plainly limited recovery to "pecuniary loss[es]," the Court held that the federal courts were not free to "supplement" the congressional directive to the point of meaninglessness. *Id.* at 625, 98 S.Ct. at 2015. Significantly, the Court observed that "DOHSA should be the courts' primary guide as they refine the *nonstatutory* death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Id.* at 624, 98 S.Ct. at 2014 (emphasis added).

After *Alvez*, the maritime rules regarding loss of society damages in this circuit developed somewhat un-

evenly. In light of *Gaudet* and *Alvez*, we took a friendly view of loss of society damages in *Cruz v. Hendy Int'l Co.*, 638 F.2d 719 (5th Cir.1981) (overruling in part *Christofferson v. Halliburton Co.*, 534 F.2d 1147 (5th Cir.1976)). In that case a seaman suffered personal injuries while his vessel was in Louisiana territorial waters. *Id.* at 721. His wife sued for loss of consortium and loss of society under the Jones Act and general maritime law. *Id.* at 722. We held that the spouse of a person entitled to recover for vessel unseaworthiness has a cause of action for loss of society, whether the injured person was injured on the high seas or in territorial waters. *Id.* at 725. On the other hand, we held that the non-dependent parents of a seaman killed in territorial waters and survived by a spouse or children could not recover loss of society damages under the general maritime law in *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 445, 460-61 (5th Cir.1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986). Applying the general maritime law to an accident that occurred on Lake Pontchartrain, the court in *Truehart v. Blandon*, 672 F.Supp. 929, 930 (E.D.La.1987), extended *Sistrunk* to bar loss of society recovery to non-dependent parents of a non-seaman killed on navigable waters and leaving no surviving spouse or children.

In 1990, the Supreme Court again turned its attention to this complex area of the law. In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), a seaman had been stabbed to death by a fellow crew member, and the decedent's mother sued the vessel owner for compensation, including loss of society damages. *Id.* at 21-22, 111 S.Ct. at 320. The issue before the Court was whether loss of society damages are recoverable in a suit brought under the general maritime law for the death of a Jones Act seaman. *Id.* at 21, 111 S.Ct. at 320. The Court held that such damages are not recoverable, extending the rule established in *Higginbotham* for DOHSA cases to "all actions for the wrongful death

of a seaman, whether under DOSHA, the Jones Act, or general maritime law." *Id.* at 33, 111 S.Ct. at 326. The Court limited *Gaudet* to its precise facts. *Id.* at 31, 111 S.Ct. at 325 ("The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen.").[6]

Thus, *Gaudet* remains good law, even though its application has been severely limited. This case comes squarely within its ambit. Randall, we have held, was a longshoreman within the meaning of the LHWCA, and his accident occurred within Louisiana state territorial waters. *Miles,* therefore, does not preclude loss of society damages as a matter of law in the instant case. The continued vitality of *Gaudet* and *Alvez* on their facts has been noted. *See Ferrana v. Fukuoka Senpaku K.K.*, 1991 A.M.C. 2249, 2252, 1991 WL 50040 (D.Mass.1991) (holding that an injured longshoreman suing under the LHWCA may still bring claims for loss of consortium on behalf of his spouse under *Alvez* even after *Miles*). We note, as did the *Ferrara* court, that the LHWCA does not explicitly limit damages recoverable to "pecuniary damages," as do the DOHSA and the Jones Act. *Id.* We hold that, under *Gaudet,* Randall's survivors were entitled to recover loss of society damages.

Chevron argues in the alternative that the district court erred in awarding loss of society damages to Randall's adult son because only financial dependents may recover such damages and there was no evidence that Rod Randall was dependent upon his father. In our view, the law of this circuit does not unequivocally limit recovery of loss of society damages for the wrongful death of a parent to children who are financially dependent on the deceased

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[6] The limitation of the *Gaudet* rule to longshoremen injured in state territorial waters has been scrupulously observed. *See Robertson v. Arco Oil and Gas Co.*, 766 F.Supp. 535, 539 (W.D.La.) (holding that a dependent of a longshoreman injured on the outer continental shelf rather than in state territorial waters may not recover damages for loss of the longshoreman's consortium), *aff'd*, 948 F.2d 132 (5th Cir.1991).

parent. The case of *Skidmore v. Grueninger*, 506 F.2d 716 (5th Cir.1985), clearly holds that adult offspring are within the class of plaintiffs entitled to loss of society damages in a *Moragne* wrongful death action. *Id.* at 729 n. 11. Financial dependence was not mentioned in *Skidmore* as a prerequisite to recovery of loss of society damages by an adult child, and in dicta we have characterized *Skidmore* as allowing an adult, non-dependent child to recover for loss of her mother's society. *Sistrunk*, 770 F.2d at 458 n. 2. More recently, however, we have noted that the district court in *Skidmore* explicitly found that the adult child seeking loss of society damages was in fact dependent on the decedent. *Miles v. Melrose*, 882 F.2d 976, 987 (5th Cir.1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

In any event, we need not unravel this tangled skein of case law today. In ruling on Sea Savage's post-trial motion to amend the judgment, the district court specifically found that Rod Randall was financially dependent on his father. Both Sea Savage and Chevron argue in their briefs that there was no evidence to support this finding, making much ado about the fact that Randall did not declare his son as a dependent on his income tax returns. However, other credible evidence supports the district court's finding. As Rod Randall testified, he had dropped out of college and was living at home when his father died.[7] It appears that he had lived at home for most of his life; indeed, he was only twenty-one at the time of his father's death. He worked for his father helping maintain the family's farm and trucking equipment. The district court's finding of dependence was not clearly erroneous. When a

[7] The court below also held, in the alternative, that a presumption of dependency exists whenever a child continues to live at home with his parents, adopting the reasoning found in *Truehart v. Blandon*, 672 F.Supp. 929, 937 (E.D.La.1987). Because we affirm the court's finding that Rod Randall was in fact dependent upon his father, we need not address the validity of this presumption.

family unit is maintained by dependence on a single family member, each of the dependents may recover for his losses including loss of society in a *Morange* wrongful death claim under general maritime law. *In re Complaint of Patton-Tully Transp. Co.*, 797 F.2d 206, 213 (5th Cir.1986).

We affirm the district court's awards of loss of society damages.

D. *Indemnity and Insurance*

As is often the case in this type of dispute, the most hotly contested issue is not whether the accident victim or his family should be compensated but rather who should ultimately bear the cost of that compensation. The district court decided that Chevron was entitled to both indemnification for its liability from Sea Savage and insurance coverage for its liability from the underwriters of the insurance procured for Chevron by Sea Savage. We address these holdings in turn.

1. *Indemnity*

Sea Savage mounts a two-pronged attack on the district court's holding that it was liable to indemnify Chevron in this case. First, Sea Savage argues that the language of the indemnity clause contained in its time charter with Chevron does not entitle Chevron to indemnification for damages arising out of Chevron's own negligence. Second, Sea Savage argues that Chevron's liability in this case does not arise out of the "management or control" of the SEA SAVAGE as required by the time charter. Because Sea Savage's first argument is meritorious, we do not reach Sea Savage's second point.

We begin our analysis with the words of the time charter themselves. That contract provides, in pertinent part, as follows:

> Owner shall man, operate, and navigate the vessel. The vessel shall prosecute its trips and perform its services with dispatch, as directed by the charterer, but responsibility for the management and navigation and operation of the vessel shall remain at all times in the owner, same as when trading for owner's account; and nothing herein contained shall be construed as making this a demise. . . . Owner hereby agrees to defend, indemnify and hold harmless Chevron against all claims for taxes or for penalties or fines, as well as against any and all claims for damages, whether to person or property, and howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel.

As a maritime contract, the time charter is governed by federal law. *Thurmond v. Delta Well Surveyors,* 836 F.2d 952, 952 (5th Cir.1988). Indemnity agreements are valid and enforceable under federal law. *Id.*

Sea Savage argues that *Lanasse v. Travelers Ins. Co.,* 460 F.2d 680 (5th Cir.1971), *cert. denied,* 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed.2d 120 (1972), is dispositive. In that case a crane operator on an offshore oil platform owned by Chevron accidently injured Porphine Lanasse, a crew member on a vessel receiving equipment from the platform. *Id.* at 582. Chevron argued, as it argues here, that the indemnity provision of its time charter with the vessel owner shifted all liability for the incident onto the vessel owner. *Id.* at 683. Examination reveals that the indemnity provision at issue in the instant case is essentially identical to the one at issue in *Lanasse,* from which we quote:

> Owner shall man, operate, and navigate the vessel. * * * Responsibility for the management and navigation and operation of the vessel shall remain at all times in the owner. * * * Owner hereby agrees to indemnify and hold harmless [Chevron] against all

> claims * * * as well as against any and all claims for damages, whether to person or property, and howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel.

Id. at 582 n. 4 (emphasis deleted). The court held that the language of this indemnity agreement could not be stretched so far as to reach the negligence of Chevron's crane operator, as this negligence was "not even remotely related to the operation, navigation or management of the vessel." *Id.* at 583. We also held that, even if the crane accident were covered under the "operation of the vessel" clause, the indemnity provision could not be construed to entitle Chevron to indemnification for liability arising from the negligence of its own employees. *Id.* at 583-84 (stating that contractual indemnity for one's own negligence arises only from the "plainly expressed intention of the parties, manifested by language couched in unmistakable terms").

The district court relied on *In re Incident Aboard D/B Ocean King*, 758 F.2d 1063 (5th Cir.1985), in reaching its conclusion that this indemnity provision did include an agreement that Sea Savage would indemnify Chevron for losses arising out of Chevron's own negligence. That case involved a gas blow out and fire aboard a jackup drilling rig off the coast of Texas. *Id.* at 1065. The operator of the rig had agreed to bear all costs and liability in the event of a blow out "from any cause," and the contract provided that Louisiana law applied. *Id.* at 1067 & n. 5. Noting that this contract involved an "allocation of risk provision" rather than an "indemnity" provision, we held that, under Louisiana law, the language was broad enough to require the operator to bear the risk of the owner's negligence. *Id.* at 1067 (citing *Polozola v. Garlock, Inc.*, 343 So.2d 1000 (La.1977), and *Polozola v. Garlock, Inc.*, 376 So.2d 1009 (La.Ct.App.1979), *cert. denied*, 379 So.2d 1103 (La.1980)).

Sea Savage argues that *Ocean King* is inapposite because it involved the application of Louisiana law rather than federal law. The district court reached the opposite conclusion, using the following reasoning: (1) Louisiana law requires more specificity than federal law in order for an indemnity provision to include indemnification for an indemnitee's own negligence; (2) the instant indemnity provision would include indemnification for Chevron's own negligence under Louisiana law; and (3) therefore the instant indemnity provision includes indemnification for Chevron's own negligence under federal law. *Randall,* 788 F.Supp. at 1396.

We are not convinced that the district court's basic assumption—that federal law construes indemnity provisions more generously in favor of the indemnitee than Louisiana law—is correct. Our cases reveal many instances in which we have held that "[l]ong-established general principles of interpreting indemnity agreements require that indemnification for an indemnitee's own negligence be clearly and unequivocally expressed." *Theriot,* 783 F.2d at 540 (quoting *Seal Offshore, Inc. v. American Standard, Inc.,* 736 F.2d 1078, 1081 (5th Cir.1984)); *see also United States v. Seckinger,* 397 U.S. 203, 211, 90 S.Ct. 880, 885, 25 L.Ed.2d 224 (1970) (interpreting a government contract according to the principle that "a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties"); *Orduna S.A. v. Zen-Noh Grain Corp.,* 913 F.2d 1149, 1153 (5th Cir. 1990) ("Before enforcing an indemnification clause for an indemnitee's own negligence, a court must be firmly convinced that the exculpatory provision reflects the intention of the parties." (citations omitted)). Our interpretation of Louisiana law has been consistent with these principles. *See Amoco Prod. Co. v. Forest Oil Corp.,* 844 F.2d 251, 253 (5th Cir.1988) ("Under Louisiana law, however, an indemnification agreement will not be

construed to cover losses arising from the indemnitee's negligence unless a mutual intent is expressed in unequivocal terms." (footnote omitted)); *Ocean King,* 758 F.2d at 1068. The applicable standard thus seems to be the same under both Louisiana and federal law.

It may be that the *Ocean King* case, relied upon by the district court, is properly distinguished from the instant case. Our case is somewhat similar to *Amoco Production,* 844 F.2d at 256, in which the court confronted a contractual provision in which the parties agreed that the "specific operation" in question would be conducted at the "sole cost, risk and expense" of one party. The court declined to follow *Ocean King* and instead held that the provision did not demonstrate with sufficient clarity a mutual intent to provide indemnification for Amoco's negligence. *Id.* at 254. In distinguishing *Ocean King,* the court first noted that the indemnity provision in *Ocean King* was much more specific than the general indemnity provision at issue in *Amoco Production. Id.* at 256. The same may be said of the indemnity provision at issue in the instant case. We do not believe that Sea Savage's duty to indemnify Chevron for losses "howsoever arising" is sufficiently clear and unequivocal to shift liability for Chevron's negligence onto Sea Savage. As the *Amoco Production* court also noted, the result in *Ocean King* seems to have been based in part on the fact that the agreement in that case was the product of extensive negotiations, *id.* at 257 n. 9, the time charter in the instant case seems to be a form contract prepared and provided by Chevron. Finally, we note that indemnity contracts are to be strictly construed. *Smith v. Tenneco Oil Co.,* 803 F.2d at 1388.

In the final analysis, however, we need not decide whether *Ocean King* is distinguishable because *Lanasse* is controlling. Confronting the indemnity provision in *Lanasse* we held that damages caused by the indemnitee's own negligence were not covered. *Lanasse,* 450 F.2d at

582 n. 4, 583-84. There are no legally significant differences between that indemnity provision and the one in the instant case—indeed, both appear to be derived from Chevron's own form contracts. Even if *Lanasse* and *Ocean King* are in conflict, we are bound to follow *Lanasse* as the earlier precedent. *Luna v. United States Dep't of Health and Human Servs.*, 948 F.2d 169, 172 (5th Cir.1991). If proof of the continuing vitality of *Lanasse* were required, it would be provided by our disposition in *Lavergne v. Chevron U.S.A., Inc.*, 782 F.Supp. 1163, 1172 (W.D.La.1991), *aff'd mem.*, 980 F.2d 1444 (5th Cir.1992), in which the district court confronted language identical to the indemnity provisions in the instant case and held that it did not require indemnification for Chevron's (the indemnitee's) own negligence. Thus, in light of *Lanasse* and our disposition in *Lavergne*, we hold that the district court erred in holding that Chevron was entitled to indemnification from Sea Savage for those damages attributable to Chevron's own negligence.

2. *Insurance*

Although we have concluded that Chevron was not entitled to indemnification from Sea Savage under the terms of the time charter, Chevron may still avoid bearing the ultimate cost for its negligence through the protection and indemnification policy (P & I policy) procured by Sea Savage naming Chevron as an additional insured. Sea Savage was required to provide Chevron with such insurance protection by the terms of the time charter, the relevant portion of which reads as follows:

> During the life of this charter, owner will, at its own expense, provide and maintain insurance covering all liabilities which might arise from the possession, management, manning, navigation and operation of the vessel, which said policies shall be in form and amount, and with companies as required and approved by Chevron; and on which policies

> Chevron shall be included as party assured and all rights of subrogation against Chevron shall be waived.

Sea Savage obtained primary insurance coverage from Royal Insurance Company, among others, and excess coverage from American Home Insurance Company (collectively, "the underwriters").

The underwriters moved for summary judgment on Chevron's claims against them before trial. The district court granted these motions on the grounds that Randall's accident fell outside the scope of the P & I policy. *Randall,* 788 F.Supp. at 1399-1400. After trial, the court reconsidered its decision and reversed itself, holding that the accident was within the scope of the policy and that Chevron was entitled to insurance coverage. *See id.* at 1406. The court found that no prejudice to the underwriters resulted from their absence from the trial. *Id.* at 1400-01. The underwriters challenge the district court's holding that Chevron is entitled to insurance coverage for its share of the liability for Randall's death.

The pertinent provision in the P & I policy issued to Chevron reads as follows:

> The Assurer hereby undertakes to make good to the Assured . . . all such loss and/or damage and/or expense as the Assured shall as *owners* of the vessel named herein have become liable to pay and shall pay on account of . . . liability for loss of life of, or personal injury to, or illness of, any person. . . .

(emphasis added). The underwriters argue that Chevron's negligence in this case was not committed in the capacity of "owner" of the SEA SAVAGE, and that Chevron thus lacks coverage under the policy. Chevron argued to the district court that this clause had been deleted, but the district court disagreed, *see Randall,* 788 F.Supp. at 1401-03, and Chevron does not challenge this finding on appeal.

The question presented for our decision, quite simply, is whether the district court correctly held that the liability incurred by Chevron in its capacity as time charterer was incurred "as owner" within the meaning of the insurance policy. The court's reasoning, it appears, was largely based on the assumption that the term "owner" has the same meaning in the insurance policy as it does in § 902(21) in the LHWCA. *Randall,* 788 F.Supp. at 1405 ("Because the LHWCA treats a time charterer as a vessel owner and because Chevron's negligence arose from its status as time charterer, Chevron incurred its liability 'as owner' of the vessel."). The underwriters' argument that "owner" does not necessarily mean the same thing in the insurance context as it does in the LHWCA is well-taken. We proceed to our de novo review of this issue of insurance contract interpretation, tracing the jurisprudence of this circuit on this recurring question.

Both Chevron and the underwriters acknowledge that *Lanasse* is the seminal case in this area of the law. In *Lanasse,* Chevron claimed it was entitled to insurance coverage "as owner" of the vessel on which the victim was injured by the negligence of Chevron's crane operator. *Lanasse,* 450 F.2d at 583. The court disagreed. In the words of Chief Judge Brown,

> There must be some causal operational relation between the vessel and the resulting injury. The line may be a wavy one between coverage and non-coverage, especially with industrial complications in these ambiguous amphibious operations plus those arising from the personification of the vessel as an actor in a suit in rem. But where injury is done through nonvessel operations, the vessel must be more than the inert locale of the injury.

Id. at 584 (footnote omitted). Although the phrase "causal operational relation" does little to clarify the meaning of the phrase "as owner" in the instant case, *Lanasse* clearly suggests that a time charterer may become

eligible for insurance coverage "as owner" under some circumstances.

The underwriters direct our attention to *Graham v. Milky Way Barges, Inc.*, 590 F.Supp. 721 (E.D.La. 1984), *aff'd in part and rev'd in part*, 824 F.2d 376 (5th Cir.1987). In that case, the court held Chevron responsible in its capacity as time charterer for its negligence in dispatching a vessel in rough weather, leading to the capsizing of the vessel. *Id.* at 728-29. The court also held that Chevron was not entitled to insurance coverage because its liability arose out of its acts as platform owner rather than as owner or operator of the vessel. *Id.* at 730. We expressed approval of the district court's ruling that Chevron's negligence was independent of any negligence arising from the "maintenance or operation" of the vessel, *Graham*, 824 F.2d at 388, which suggests that Chevron's negligence in dispatching the SEA SAVAGE may have lacked any connection to the operation of the vessel, and thus that the requisite "causal operational relation" to the death of Randall may be absent. However, we did not deny insurance coverage based on Chevron's status or non-status "as owner," but rather decided instead that insurance coverage was not available because Chevron had violated the navigational and operational limits imposed by the policy. *Id.* at 384. *Graham* thus does not represent an absolute repudiation of our statement in *Lanasse* that time charterers may be covered by insurance policies "as owner" in some circumstances.

Chevron cites the *Helaire* case in support of the proposition that any negligence it may have committed as time charterer is within the "as owner" language of the insurance policy. As we have seen, the time charterer in that case was held liable for injuries suffered by a worker who was unloading equipment from a vessel to a platform under § 905(b) of the LHWCA. *Helaire*, 709 F.2d at 1033, 1041-42. The district court in *Helaire* ruled that the time charterer was entitled to insurance coverage under a policy essentially identical to the instant policy, and we af-

firmed. *Id.* at 1041, 1042 & n. 17. However, as the underwriters point out, we also noted that the words "as owner of the vessel" had been deleted from the policy, so the time charterer was entitled to coverage regardless of the capacity in which it was sued. *Id.* at 1042. The opinion also appears to conflate the meaning of "owner" under the policy with the definition of "vessel owner" in the LHWCA, although this is not clear. *Id.* at 1041-42.

Chevron also relies on *Texas E. Transmission Corp. v. Garber Bros.*, 547 F.Supp. 821 (E.D.La.1982). In that case, Union Oil Company entered into a time charter with Garber Bros. for the use of a vessel; during operations the vessel's anchor collided with a pipeline owned by Texas Eastern Transmission Corporation. Union Oil was named as an additional insured, and the policy apparently included the same "as owner" language as the policy in issue in the instant case. *Id.* at 822. Although the claims against Union Oil were dismissed, Union Oil sought reimbursement for its expenses under the terms of the policy. *Id.* Union Oil argued that it had been sued by Texas Eastern for directing the vessel to undertake the operations that damaged the pipeline and for failing to assist the vessel when the risk of collision became apparent, that these charges were made against Union Oil in its capacity as charterer of the vessel, and that insurance coverage was thus available. *Id.* The district court in *Garber Bros.* reasoned that vessel-related negligence by a party comes within the "as owner of" provision, while negligence committed as platform owner does not. *Id.*

Sea Savage and its underwriters argue that *Garber Bros.* was implicitly overruled by this court's decision in *Texas E. Transmission Corp. v. McMoRan Offshore Exploration Co.*, 877 F.2d 1214 (5th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 332, 107 L.Ed.2d 321 (1989). In that case, McMoRan was one of multiple parties that had hired towing services from Faustug Marine Corporation. *Id.* at 1217, 1226. During the towing of a semi-

submersible drilling rig that McMoRan had acquired by assignment, an anchor of the towing vessel supplied by Faustug damaged a pipeline owned by Texas Eastern. *Id.* at 1217-19. McMoRan's liability for its role in ordering the retrieval of the anchor was assessed at 10%. *Id.* at 1220-21. In the course of discussing whether the contract between Faustug and McMoRan required Faustug to insure McMoRan against this kind of liability, the court noted that "[t]he usual form of Protection & Indemnity insurance, which 'insures only against liability resulting from *vessel ownership,*' would not provide coverage for McMoRan, a non-shipowner." *Id.* at 1227 (footnote omitted).

We do not agree with the position urged by Sea Savage and its underwriters. Their interpretation of *McMoRan* would make it virtually, if not completely, impossible for a time charterer ever to receive insurance coverage under any circumstances, and if *McMoRan* did have such an effect we might be forced to disregard it as inconsistent with our earlier opinion in *Lanasse.* This is not necessary, however, as the underwritters have overstated the breadth of the holding in *McMoRan.* As that court clearly stated,

> Any P & I insurance that Faustug might have obtained would not have covered McMoRan's negligence, since McMoRan's negligence did not arise out of the ownership of a vessel, but out of the operation of an anchor retrieval process in which the vessel was only "the inert locale of the injury.".

Id. at 1228 (quoting *Lanasse,* 450 F.2d at 584). *McMoRan* thus does not completely foreclose the possibility that a time charterer can be covered under an insurance policy protecting an insured "as owner" on a proper set of facts.

Additionally, as we have suggested, the interpretation of the insurance policy urged by Sea Savage and its underwriters would render the insurance coverage virtually

meaningless. Sea Savage argues that, as owner of the SEA SAVAGE, it retained control of the navigation, management, and operation of the vessel. Sea Savage also argues that "by contract and tradition, Chevron could not act as a manager or operator of the vessel," and that "as a matter of common sense it could not commit fault 'as owner' of the vessel." If this were true, then the insurance policy providing coverage for Chevron's liability "as owner" of the vessel could never come into effect. Under this interpretation, no time charterer could ever satisfy the "causal operational relationship" requirement so as to qualify for insurance coverage "as owner" of the vessel. We will not construe an insurance policy in such a way that it provides no coverage whatsoever to the insured.

The only connection a time charterer typically has with the vessel it hires is the right to direct the vessel's movements. We find persuasive the reasoning of the court below and that of the court in *Garber Bros.* that when the time charterer exercises this right negligently, it has committed negligence "as owner" of the vessel within the meaning of that phrase in a marine insurance policy. This type of negligent conduct, it seems to us, has the requisite "causal operational relationship" to the vessel, even though the time charterer wholly lacks the authority to direct the minutiae of the vessel's day-to-day operations. "In this action, Chevron's contribution to Randall's death, ordering the vessel to encounter dangerous seas, clearly is related to the vessel." *Randall,* 788 F.Supp. at 1403. The district court correctly ordered the underwriters to provide insurance coverage to Chevron.

3. *Chevron's Expenses Incurred Defending Mrs. Randall's Punitive Damages Claim*

Chevron argues that the district court erred by refusing to award Chevron costs and attorneys' fees incurred in connection with Mrs. Randall's claims for punitive dam-

ages. Chevron contends that it is entitled to reimbursement for these expenses under both the indemnity provision of the time charter and the P & I policies. The claim based on the indemnity provision of the time charter must fail because, as we have already held, Chevron is not entitled to indemnification from Sea Savage for any losses suffered by Chevron as a result of its own negligence. We must now consider whether Chevron may recover its costs and attorneys' fees from Sea Savage's underwriters.

As has been observed, the seminal question in resolution of this coverage issue is the choice of law to be applied. 2 Parks, *supra,* at 1039. We have recently resolved this issue in favor of state law. In *Taylor v. Lloyds Underwriters,* 972 F.2d 666, 667 (5th Cir.1992), *cert. denied,* —— U.S. ——, 113 S.Ct. 1366, 122 L.Ed. 2d 744 (1993), several seaman were injured when their lifeboat capsized in the Gulf of Mexico, and they recovered compensatory and punitive damages against the boat's charterer in an action brought under general maritime law. The charterer was insolvent, and the plaintiffs sought to recover against three insurance policies, including a comprehensive general liability policy and a P & I policy. *Id.* The district court granted the insurer's motion for summary judgment, holding that the general maritime law disallows the recovery of punitive damages from an insurance company. *Id.* We reversed, holding that no specific and controlling federal rule disallowed such recovery. *Id.* at 669. We held that the district court should have applied the law of the state having the greatest interest in the resolution of the issues, and we remanded so that the district court could make that determination. *Id.* In this case, Louisiana law provides the rule of decision.

The P & I policy in question insures Chevron with respect to "[c]osts, charges, and expenses, reasonably incurred and paid by the Assured in defense against any

liabilities insured against hereunder in respect of the vessel named herein."[8] Thus, if punitive damages are liabilities covered by the P & I policy, Chevron is entitled to recover from the underwriters the attorneys' fees it spent defending against the punitive damages claim. Chevron cites several Louisiana cases for the proposition that liability insurance contracts provide coverage for claims for punitive damages unless specifically excluded by the policy. *See Sharp v. Daigre*, 555 So.2d 1361, 1363 (La.1990) (holding that exemplary damages may be recovered from an insurer on a policy reading "We will pay damages which a covered person is legally entitled to recover . . . because of bodily injury. . . ."); *Creech v. Aetna Casualty & Sur. Co.*, 516 So.2d 1168, 1171 (La. Ct.App. 1987), *cert. denied*, 519 So.2d 128 (La.1988). Thus, argues Chevron, because the underwriters would have been obligated to cover any award of punitive damages against Chevron, they must provide coverage for the costs and attorneys' fees Chevron incurred in defending the claim for punitive damages.

The underwriters argue that punitive damages, and by extension expenses incurred in defending against such damages, are excluded from coverage under the policy. They contend that punitive damages are not liabilities "for loss of life of . . . any person" as are covered by the policy. For support the underwriters cite *Smith v. Front Lawn Enters.*, 1987 A.M.C. 1130, 1130-31 (E.D.La. 1986), in which the court held that an essentially identical policy did not provide coverage for a claim for punitive damages based on unseaworthiness and refusal to pay maintenance and cure. In *Taylor*, however, we took note of the view expressed in *Smith* and declined to interpret it as establishing a controlling federal rule, holding instead that state law should provide the rule of

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[8] We refer, as do the parties, only to the primary P & I policy, because the excess P & I policies cover the same liabilities as the primary policy.

decision. *Taylor,* 972 F.2d at 668-69; *see also* 2 Parks, *supra,* at 1041 (noting that no federal cases exist regarding the coverage of punitive damages issue).

Although the *Sharp* case, decided by the Louisiana Supreme Court, deals with uninsured motorist insurance only, there is nothing in the opinion to suggest that its holding would not apply with equal force to other types of insurance. P & I policies are, strictly speaking, indemnity policies rather than liability policies, but the indemnity is itself basically against liabilities, Parks, *supra.* at 1004, and in general indemnity policies are construed like any other insurance policy. *Id.* at 839. Sea Savage's underwriters have not directed our attention to any Louisiana cases suggesting that the application of *Sharp* should be limited in any way, nor does our research uncover any. The policy language at issue in *Sharp,* which covered damages arising "because of bodily injury, sickness, or disease," is not more general or all-encompassing than the "[l]iability for loss of life of, or personal injury to, or illness of, any person" language in the instant P & I policy. We therefore hold that under Louisiana law, applied in the absence of a controlling federal rule, punitive damages are covered by the P & I insurance policy at issue in the instant case. Chevron is therefore entitled to recover its costs and attorneys' fees expended in defending Mrs. Randall's claim for punitive damages. The district court's holding to the contrary is reversed.

E. *Attorneys' Fees*

Our final task on this appeal is to review the district court's award of attorneys' fees to Chevron. The district court referred Chevron's claim for attorneys' fees to a magistrate judge, who made several recommendations that Chevron's claims be reduced in amount. Specifically, the magistrate judge recommended that the hourly rate of Chevron's lead trial counsel be reduced from $175 to $150 and that the total number of hours billed by Chev-

ron's attorneys be reduced by 30%. The district court heard oral argument and refused to adopt these recommendations, instead finding the hours and rates requested by Chevron to be reasonable. Sea Savage asks this court to reverse the decision of the district court and to enforce the recommendations of the magistrate judge.

Our review of the award is hampered by Sea Savage's utter failure to present any authority in its brief for its position that the award is excessive. Sea Savage does not point out any errors made by the district court. Neither does Sea Savage address the standard of review the district court should have applied to the magistrate judge's recommendations, or for that matter the appropriate standard of review applicable on this appeal. In essence, Sea Savage's argument boils down to a bald assertion that the magistrate judge's recommendation was correct and the district court's ultimate award was not, plus a request that we "review Chevron's billings" ourselves. This does not satisfy the requirements of Federal Rule of Appellate Procedure 28(a)(5), which requires the argument section of the appellant's brief to contain not only the party's contentions but also its "reasons therefor, with citations to the authorities, statutes and parts of the records relied on." In the absence of logical argumentation or citation to authority, we decline to reach the merits of Sea Savage' contention. *See United States v. Ballard,* 779 F.2d 287, 295 (5th Cir.) (holding that claims made "without citing supporting authorities or references to the record" are considered abandoned on appeal), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986); *Kemlon Prods. and Dev. Co. v. United States,* 646 F.2d 223, 224 (5th Cir.) (refusing to reach the merits of a party's claims when that party's brief addressed neither the merits of its own claims nor the reasoning of the district court), *cert. denied,* 454 U.S. 863, 102 S.Ct. 320, 70 L.Ed.2d 162 (1981).

IV.

For the foregoing reasons, we REVERSE the district court's award for pain and suffering and REMAND for the granting of a remittitur to $500,000 or a new trial on damages at Sea Savage's option. We REVERSE the district court's holding that Chevron is entitled to indemnification from Sea Savage under the time charter. We also REVERSE the district court's denial of attorney's fees to Chevron for its defense of the claim for punitive damages and REMAND for determination of those fees. In all other respects, the judgment of the district court is AFFIRMED. Costs shall be borne by Chevron and Sea Savage.

ROBERT M. PARKER, District Judge, concurring in part, dissenting in part:

I concur with the majority opinion, with the exception of the remittitur portion contained in Section III., C., 1., *Damages; Pain and Suffering.* I am persuaded that the district court's assessment of the facts of this case as it relates to the award of damages in the amount of $1,000,000.00 for pain and suffering is not only not clearly erroneous, but falls within the bounds of reasonable compensation under the circumstances. I therefore limit my dissent to the remittitur ordered.

[Date of Entry Nov. 6, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346

SECTION G

BARBARA S. RANDALL

versus

CHEVRON U.S.A., INC.

JUDGE MOREY L. SEAR PRESIDING

WEDNESDAY, OCTOBER 30, 1991

SEA SAVAGE'S MOTION FOR SUMMARY JUDGMENT; SEA SAVAGE'S MOTION TO LIMIT LIABILITY; AMERICAN HOME ASSURANCE'S MOTION TO DISMISS; AND CHEVRON'S MOTION FOR PARTIAL SUMMARY JUDGMENT WERE CALLED FOR HEARING.

FOLLOWING ORAL ARGUMENT, SEA SAVAGES MOTION FOR PARTIAL SUMMARY JUDGMENT WAS DENIED AS MOOT BECAUSE IT HAD BEEN RE-SUBMITTED; SEA SAVAGE'S MOTION TO LIMIT LIABILITY WAS DENIED; AMERICAN HOME ASSURANCE'S MOTION TO DISMISS WAS TAKEN UNDER SUBMISSION; AND AS TO CHEVRON'S MOTION FOR PARTIAL SUMMARY JUDGMENT THE COURT FINDS THAT MR. RANDALL WAS A LONGSHOREMAN OR HARBOR WORKER WITHIN THE MEANING OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

TRANSCRIPT HON. MOREY L. SEAR
NOVEMBER 14, 1991

As we have had the opportunity to say earlier this afternoon, this is a case that is a most tragic one, but that in my opinion, counsel has treated in highest traditions of our profession, and I compliment each on the manner in which the case was handled, the details of the tragedy recounted, and the method by which you have proceeded.

We deal with several concepts of law, all of which I think we need to be familiar with before we analyze the facts of this case and reach conclusions with regard to those facts. The standard of care that I attribute to the vessel SEA SAVAGE is the one that is set out in a Fifth Circuit case 1986, *Smith v. Southern Gulf Marine Co. No. 2,* found in 791 F.2d 416, at p. 420 and 421, and essentially the standard that the Fifth Circuit establishes is this. The court says that the standard of care owed to passengers on a ship has variously been stated as a high degree of care, as a duty of ordinary care, as a reasonably safe means of boarding and leaving the vessel, as a duty of reasonable care and as a duty of reasonably care under the circumstances. In spite the various formulas enunciated in these cases, the court says a review of the facts and stated standards of care shows that ship owners, relatively speaking, are held to a high degree of care for the safety of passengers, and the Circuit adheres to the standard that ship owner owes the passengers the duty of exercising reasonable care under the circumstances of each case.

The Circuit also tells us that, the crew of a vessel has a duty to provide a reasonably safe means of ingress or egress from a vessel. I believe that that sets forth the standard by which I judge the conduct of the parties insofar, the conduct of the vessel owner, I should say.

Insofar as Chevron is concerned, the Fifth Circuit tells us that a time charterer may be liable for directing

the vessel to encounter natural conditions, like hurricanes or treacherous seas, and that a time charterer may be liable for a injury resulting from a decision to continue unloading operations in treacherous weather conditions, and that is the standard by which we will judge the conduct of the time charterer as against the facts of this case.

The final concept of law that I want to put before us at this point, it is that which relates to limitation, an issue that Sea Savage has consistently urged, and I stated the law on limitation this way, and of course this is not my words, this is for the most part the text of Professor Shambaum, his book on maritime law. Incidentally, it has a very good review of limitation in the little pamphlet that Maritime Law Association just sent out in L.A. Report, I think I received only yesterday, perhaps the day before, written by Tony Rodriguez. And that concept of limitation is this: that a vessel owner or a bare boat charterer may limit only if he is without privity or knowledge of the cause of the loss. Whether an owner has privity or not depends largely on the particular facts of each case. Some of the most frequent denials of limitation occur in cases where the incident results from one of the following causes: inadequate or improper operating and/or training procedures, or inadequate or inaccurate charts and/or other aids to navigation. The determination of whether the ship owner has established a lack of privity and knowledge of the fault involves a delicately balance inquiry. Privity and knowledge exists where the owner has actual knowledge or could have and should have obtained the necessary information by reasonable inquiry or inspection. This necessity is a reasonable man test applied on a case by case basis considering all of the circumstances. The real problem is to determine whether the ship owner or persons acting for him acted reasonably under the circumstances. Principal reason for denying limitation is because management failed to provide proper procedures for the maintenance of equipment, the

training of the crew, or adequate check to insure the implementation of established maintenance and safety procedures.

The tragedy in this case began and ended July 31, 1989, when T. F. Randall who was employed by defendant, Chevron U.S.A., in the capacity of a mechanic, lost his life in West Delta Block 27, the oil field in which he had been employed; and that field is located within the three mile coast line of the State of Louisiana.

To assist Chevron in operating that field or its platforms in that field, Chevron entered into a time charter agreement with Sea Savage for the use of its vessel M/V SEA SAVAGE, and while that vessel was used primarily as a utility boat, it also had the capacity and was used for the transportation of passengers. The boat, it seems, regularly called on the West Delta 27 Platform 1, P1, about twice a week. The vessel was certified to carry passengers by the Coast Guard, and it had on its stern what is commonly called and has been referred to in this case as a jump station; and certainly the owners of the vessel SEA SAVAGE knew of its certification, and knew of its use as a vessel carry and transporting passengers, and, of course, the parties have stipulated the SEA SAVAGE was owned by, the motor vessel SEA SAVAGE was owned by the SEA Savage, Inc.

Sea Savage, Inc. delegates all of its authority concerning the safety and the operation of their boat to its Captain. Chevron as the time charterer instructs the vessel on the tasks its to perform.

Now on July 31, 1991 (sic) in the early morning hours, defendant Chevron knew that a tropical depression was in the Gulf of Mexico and it began evacuation procedures including from the West Delta 21 P-1 platform. In order to evaculate personnel from that platform, the SEA SAVAGE, the motor vessel SEA SAVAGE was called and it was under the command of Captain Dalton Parker. Captain Parker testified at length, as a matter of

fact he was the first witness and testified all of the morning and part of the afternoon our first day of trial. Captain Parker had been out in the Gulf all morning long and he knew the whether was bad, and he knew that it was too rough to transfer from the platform to the vessel. Indeed, he requested to be released from the Field and to go into more shallow water, and he made that request, so he testified, to Chevron. Nevertheless, time charterer Chevron, requested that motor vessel SEA SAVAGE remain in the Field despite the weather conditions, and in so doing, Chevron directed the vessel to remain in, and to encounter the treacherous weather conditions that existed in the Gulf that morning. I should say that the weather reports indicating severe weather actually were received by Chevron the day before, on July 30th. But there is little doubt that on the morning, mid-morning of July 31st, the winds in the vicinity of West Delta 27 P-1 were in the neighbor of 35 miles per hour, and the seas have been estimated at varying heights 6-8 feet with swells as high as 10-12 feet, but certainly seas of 6-8 feet, winds of 35 miles per hour. And while winds of that nature are said not be uncommon in the Gulf of Mexico, particularly during the storm season, the weather was of a serious enough concern to Chevron to place into effect evacuation proceedings that are used in preparation for hurricanes.

Indeed, the Captain of the SEA SAVAGE had asked to be released and to return to shallow water and he was asked to remain in case of an emergency during the evacuation. In any event, Captain Parker was asked to pick up passengers from West Delta Platform 27 P-1 even though he knew and testified that the weather conditions rendered the transfer unsafe to board passengers by swing rope from the platform to his vessel.

One of the passengers, one of the Chevron employees to be evacuated from the West Delta Platform 27 P-1 was T.F. Randall. According to the testimony of Captain Parker, he based his vessel and held the stern on an

angle to the platform, and his vessel was somewhat off of the platform. He testified that the winds were from the South East and that he was on the East side of the platform. He testified that his starboard engine was in forward gear and that his port engine was in neutral. A fact that I find questionable for the reason that the wind and waves were off of his port quarter, stern quarter, pushing him ahead and if his starboard engine was in gear, forward gear, it would *seem* to me that his vessel would have been moving ahead rather than holding in a steady position in preparation to receiving passengers. Nevertheless, that is what Captain Parker testified, that his starboard engine was in forward, his port engine was in neutral, and that the wind and wave action was to his stern.

There were three persons aboard the M/V SEA SAVAGE at the time of the attempted transfer which occurred sometime in the neighbor of 10:45, was it, on that morning. There was a deck hand Nash, there was relief captain, and another deck hand. The only persons on deck were, the deck hand Nash, and the Captain who was initially in the pilot house; and though the Captain was preparing to take passengers aboard, in what he considered to be unfavorable conditions, unsafe conditions, he nevertheless failed to post any member of the crew to the stern of the vessel. While he had two additional members of the crew to assist the passengers coming aboard his vessel, in what he considered to be unsafe seas, to at least catch and try to help anybody coming aboard, he failed to even alert two crew members who were below when the passengers began coming aboard.

Indeed, the only crew member on deck, Nash, was at mid-ship as he described it. He received no instructions from Captain Parker, never told what to do by Captain Parker, but he saw Mr. Randall take the swing rope, swing aboard the vessel, land with his feet on the deck of the vessel, saw the vessel rise with the swell, slack go into the swing rope and apparently the vessel dropped

and popped Mr. Randall off the back of the vessel into the water.

The Captain became immediately aware of the fact that Mr. Randall was overboard, but he didn't know where he was, and he made no attempt to find out where he was. The deck hand, Nash, had to leave the stern of the vessel, run approximately 50 feet, traverse a hatch that was, he described as being in the way of a life ring, retrieve a life ring from the back of the pilot house, return to the stern of the vessel. A maneuver that he described as taking him about 1 minute, perhaps a little bit longer, but in the meantime, the Captain had put the vessel in forward gear, had left the area where Mr. Randall fell overboard, posted no look out, had no idea of where Randall was, and as Nash described, the forward movement of the vessel and the propeller wash pushed Randall so far away from the vessel that it was impossible for him to throw the life ring so that Randall could have caught it.

While the testimony was that there was posted on the vessel recommended procedures for man overboard, none of those procedures were followed or adhered to. First of all, the only available life ring was behind the pilot house though the vessel was intended for the carrying of passengers, and as a matter of fact, there was a rail constructed at the stern of the vessel, particularly for persons coming aboard to grasp to break their swing, and there was ample place on those rails to have a life raft mounted in the area where passengers come aboard on swing ropes and with the most likely to fall off, but there was no life ring at that point.

The first thing that is called for in the procedures man overboard posted on the vessel is throw a ring overboard as close to the person as possible. Well the Captain's actions in moving ahead forward without knowing where Randall was and washing him a stern made it impossible. The second thing, post a look out to keep the person overboard in sight. Well, there was no look out, indeed, Nash

had to leave the stern of the vessel to go and get the life ring, lose sight of Randall overboard. There was no communication between the Captain and his deck hand, indeed, the Captain gave no orders to Nash. The Captain called for no aid or assistance, it was Nash, on retrieving the life ring that alerted the other members of the crew and render assistance. The Captain didn't even do that. And the third thing that the procedure called for is to maneuver the vessel to pick up the person in the water. Instead of doing that, the Captain left. It took him, he estimates, about ten minutes to maneuver to the opposite of the platform, and all of this time Mr. Randall is swimming in the water with 35 mile an hour winds and swells of 6-8 feet. A man of obvious strength and physical stamina. And the fourth thing is to have a crew member put on a life jacket, attach a safety line and then have him standby to jump into the water and assist the person overboard if necessary. And of course, the risk of another man's life into the water probably was not appropriate, but at great risk to his own life, Nash did go over the side onto airplane tires that were latched to the side of the M/V SEA SAVAGE and did, at great personal risk, attached a line ultimately to Mr. Randall who by that time had lost his life to the sea and drowned. Got the line around him in order to pull him out of the Gulf.

The only order that I recall in the testimony of Captain Parker and the deck hand given to Nash was to put on a life jacket before going over the side and standing with his leg in that airplane tire. I have said already that there was no communication between the Captain and the members of his crew, no means of communication between them, the wind was high, the seas were rough, the engines were running. The crew member or the only person close enough to see what had happened was Nash, and I believe that he saw Mr. Randall hit the deck of the vessel and as he said pop off. He was the only one in position to see precisely what happened.

After having had fallen into the sea and being washed to stern, Randall managed to swim to the platform and to one of the structure's legs, cross member, and as the seas would rise he was able to clutch to that member and hold on until the next wave would hit him and he would be knocked off and scrapped against the barnacles of that leg, where he was cut above his body and which ultimately caused him to lose his life jacket. He was bashed by the sea against the razor edges of those barnacles and pounded by those waves for approximately 25 minutes struggling all of that time for his life and each time he reached a perched he was knocked down by another wave. As a matter of fact, during that period of time, he had the strength to look up and speak to people on the platform who were trying to help him and told them that he was getting tire. And finally, at the end of 25 minutes of struggle against the wind and the seas, against the barnacles, against the scraping, the abrasions, the cuts, the bruises, Mr. Randall slumped over face down and drowned. Nevertheless, there was this rather valiant attempt by Nash to retrieve him, very difficult, Mr. Randall was getting tired. And finally, at the end of 25 minutes that Randall for 25 minutes, suffered and ordeal. The most severe kind of mental anguish that a human being can suffer, unquestionably excruciating physical pain with the obvious knowledge that his life was coming to an end.

I find that the conduct of the Captain, on that day, that which I have described and outline, showed absolute incompetence in handling that vessel in that water under the circumstances of that tragedy. I find also that he lacked training as did the crew in life saving procedures, in man overboard procedures. Indeed, there was no training and the Captain so testified as did the deck hand. I find also that the location of the life ring, while perhaps satisfying minimal requirements of Coast Guard certification, did not satisfy basic needs of a vessel operating taking on passengers of the circumstances of this case. The lack of communication, the lack of orders, made it

impossible to effect a rescue, and I find that the vessel owner knew or should have known that the Captain was not competent to operate in this kind of condition, that the Captain and the crew lack training, that the owner did not provide the training or the instruction for the Captain and crew, that a certificated a vessel for carrying passengers and did not provide adequate rescue equipment was it was useful to the crew. It failed to require drills in rescue procedures, it failed to insure that the Captain and the crew were properly trained in rescue operations. And in hiring the crew and the Captain, relied primarily on the fact that the Captain was licensed by the Coast Guard, and did very little effort to find out what competence of the Captain to the crew was, and I find that the owner of the vessel SEA SAVAGE knew of should have known all of the things that I have described, and I find that the owner is not entitled to limit its liability, and while I find Chevron to be at fault in having placed the vessel in the seas in the weather in which it did I find that that conduct does not rise to the level that warrants punitive damages. Accordingly, plaintiffs claim for punitive damages is denied.

There was an issue that presented itself today, as to whether or not Louisiana law permits parties to challenge the cause of death stated on a death certificate. And I believe that Louisiana law does permit that and while I suspect that the issue is one of advocacy, I think it's ludicrous to believe that Mr. Randall died of anything but drowning under the circumstances of this case, the strength, the power that he showed, the stamina, without losing consciousness for 25 minutes to battle the sea and winds. I find that he died by drowning as the death certificate shows.

There is one other concept involving the law that I thinks needs to be mentioned in connection with damage and recovery, and that is, that which relates to loss of society and what it consists of, and so that all may know the basis an award is given, I go first to Blacks Law

Dictionary to tell you that the term "loss of society" means there "capacities for usefulness, aid and comfort". But the Supreme Court has done better for us for that and it has said in *Sealand Services, Inc. v. Gaudet*, "that society embraces a broad range of mutual benefits each family member receives from the other's continued existence."

I find that Mr. Randall's past lost wage is $66,725.00 and so make that award. The loss of future support $309,177.00. Lost of personal services $30,395.00. To the plaintiff, Rod Anthony Randall, for loss of society, the sum of $100,000.00. To Holly Lee Ann Randall, the daughter, the sum of $150,000.00. For Mrs. Randall, the sum of $300,000.00. For decedent's pain and suffering, the sum of $1,000,000.00. For funeral expenses, $3,897.00. The damages to be divided in this manner: 75% to vessel, 25% to the charterer.

I have done the best I can ladies and gentlemen to cover those issues of law and fact that I could under the circumstances here, of course, I reserve the right to substitute or to incorporate into the record written findings of fact and conclusions as they become necessary.

[Date of Entry Nov. 25, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346

SECTION G

BARBARA S. RANDALL

versus

CHEVRON, U.S.A., INC. *et al.*

JUDGMENT

This matter came on for trial without a jury on November 12, 1991. At the conclusion of the testimony the Court orally gave its findings of fact and conclusions of law, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Barbara S. Randall, on her own behalf and as personal representative of the Estate of the Decedent, Theodore F. Randall, Jr., and on behalf of the children, Rod Anthony Randall and Holly Leann Randall, and against defendant, Chevron, U.S.A., Inc., in the amount of Four Hundred and Ninety Thousand, Forty Eight Dollars and Fifty cents ($490,048.50) and against defendant, Sea Savage, Inc. and the M/V Sea Savage, in the amount of One Million, Four Hundred and Seventy Thousand, One Hundred Forty-Five Dollars and Fifty cents ($1,470,145.50) with interest from date of judicial demand and costs.

New Orleans, Louisiana, this 15th day of November, 1991.

/s/ Loretta G. Whyte
LORETTA G. WHYTE
Clerk

APPROVED AS TO FORM:

/s/ Morey L. Sear
United States District Judge

Minute Entry [Date of Entry Jan. 29, 1992]
Sear, J.
January 28, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346

SECTION "G"

BARBARA S. RANDALL

versus

CHEVRON U.S.A., INC.

MEMORANDUM AND ORDER

On November 25, 1991, judgment was entered in this action against Sea Savage, Inc. and Chevron U.S.A., Inc. Sea Savage, Inc. filed a Motion to Alter or Amend the Judgment and/or for New Trial. I will address each of its concerns in turn.

A. *Pre-judgment Interest*

Defendant contends that pre-judgment interest should not be applied to plaintiffs' past damage award in this case because of peculiar circumstances. In the Fifth Circuit, the general rule is that pre-judgment interest is the rule rather than the exception.[1] The district court may deny pre-judgment interest only when peculiar circumstances would make such an award inequitable.[2] Such

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[1] *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990).

[2] *Id.*

peculiar circumstances include: 1) an improper delay of the action caused by the plaintiff; 2) a genuine dispute over a good faith claim in a mutual fault setting; 3) equitable considerations which caution against an award; and 4) a damage award substantially less than that claimed by the plaintiff.[3]

Defendant contends that the case was unduly delayed and complicated by the plaintiffs' trying to make their case a "hurricane case," and by importing excessive evidence, witnesses and rhetoric from other, completely unrelated cases. Defendant also contends that plaintiffs were awarded an amount significantly less than the amount claimed. Defendant's claim fails. First, although plaintiffs' complaint sought damages well in excess of the judgment ultimately awarded (10 million dollars as compared to 2 million dollars), plaintiffs' initial demand was, as most, not the amount sought. The judgment was well within the range discussed by the parties in their settlement negotiations. The judgment was very close to the amount actually requested by the plaintiffs.

Although defendant claims that plaintiffs improperly delayed the action, it does not support this claim with specific examples of bad faith. Not awarding pre-judgment interest is reserved for peculiar circumstances. Defendant has not demonstrated such peculiar circumstances. Conclusory statements that simply point the finger will not suffice. An award of pre-judgment interest will not be reversed in the absence of an abuse of discretion.

Defendant finally contends that pre-judgment interest can be applied only to accrued damages and not to future damages. It asks that the judgment be amended to make this clear. Plaintiffs concede that this is true and consent to an amendment of the judgment in this respect. Accordingly, the judgment is amended to make clear, what I

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[3] *Id.* at 1157-58.

believe is implied, that the award of pre-judgment interest, to the extent that it applies to future damages, is erroneous.

B. *Non-Pecuniary Damages*

Defendant contends that plaintiffs should not have been awarded loss of consortium or loss of society damages because of the decision in *Miles v. Apex Marine Corp.*[4] and its progeny. It contends that because there is no distinction between the legal position of a longshoreman, such as the deceased, and persons who work on outer continental shelf platforms, there should be no difference in damages recoverable.

The Supreme Court, in *Sea-Land Services, Inc. v. Gaudet*,[5] held that a dependant plaintiff in a maritime wrongful death action could recover for the non-pecuniary loss of society. The Court in *Miles* recognized that *Gaudet* involved the death of the longshoreman and so had no need to consider the effect of the Jones Act. The *Miles* Court stated, "The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen. *Gaudet* did not consider the preclusive effect of the Jones Act for death of true seaman. We do so now."[6] The recoverability of non-pecuniary damages by longshoremen explicitly was excluded from the *Miles* decision.

Although part of the rationale in *Miles* and its progeny was to make uniform the damages recoverable under general maritime law, the major concern was that judicially-created remedies should not sanction more expansive remedies than congressional ones. Because the Jones Act was adopted from FELA, and because FELA precluded the recovery of non-pecuniary damages, the Jones Act should preclude them also. This result should occur

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[4] 498 U.S. ——, 111 S.Ct. 317 (1990).

[5] 414 U.S. 573, 591, 94 S.Ct. 806, 818 (1974).

[6] *Miles*, 111 S.Ct. at 325.

for a Jones Act seaman, whether the claim is brought under the Jones Act or general maritime law. The focus was on uniformity for a Jones Act seaman, not uniformity for all deaths that occur in the water. This case involved a longshoreman. Although it would be uniform to disallow non-pecuniary losses for all deaths that occur in water, I do not think it would be proper to expand *Miles* this far.

C. *Loss of Society for the Children*

Defendant contends that damages for loss of society should be limited by the children's reaching the age of majority and by the requirement of dependency. Although not specifically addressed, who can recover for loss of society was implied by the Supreme Court in *Gaudet*. When defining "loss of society," the Court refers to *dependents*. Throughout the opinion, recovery is recognized only in terms of dependents. The Fifth Circuit has read *Gaudet* to say that only dependents can recover for loss of society. In *Complaint of Patton-Tully Transp. Co.*[7] the court held that when a family unit is maintained by dependance on a single family member, the dependents can recover for loss of society.

My brother Schwartz addressed the question of who can recover loss of society damages in a well-reasoned opinion, *Truehart v. Blanden*.[8] He found that only dependents could recover for loss of society. In the case of unemancipated minors, this dependance would be presumed from the universal obligation in this country for parents to support their unemancipated minor children.[9] In addition, he found that probably another presumption could be found between any family members who live together. Otherwise, a person would have to show financial dependence on the deceased in order to recover.

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[7] 797 F.2d 206, 213 (5th Cir. 1986).

[8] 672 F. Supp. 929 (E.D.La. 1987).

[9] *Id.* at 937.

I agree that recovery for loss of society applies only to dependant persons. However, I agree with my brother Schwartz that a presumption of dependency should be found between family members who live together, especially when the family relationship is that of parent and child. Most of the cases I found that disallowed loss of society between family members involved family that did not live with the deceased and rarely, if ever, involved an adult child. In addition, there is Fifth Circuit authority that adult offspring are within the class of plaintiffs intended to be vindicated by such damages.[10] Both because Rod Randall lived with his father and was his father's son, I find a presumption of dependency.

Even if it was assumed that no such presumption exists, and that Rod Randall would need to show his financial dependance on his father, I think that this was shown. Rod Randall lived at home at the time of his father's death. He dropped out of college to work with his father in his business. His father was teaching him to maintain and operate the business so that one day it would be his. Since T.F. Randall's death, Rod has needed to sell part of their business and hire people to help with the operation. I find that, especially since Rod worked for his father as his only source of income, he was financially dependant on his father.

Finally, to address defendant's contention that Holly Randall's award should be reduced because of her approaching independence, there was no evidence that Holly was soon to be no longer dependant on her father.[11] The age of majority is irrelevant to loss of society damages, and there was no evidence that Holly would be moving out of the home soon. I will not speculate as to when a

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[10] *Skidmore v. Grueninger*, 506 F.2d 716 (5th Cir. 1975).

[11] *Complaint of Patton-Tully Transp. Co.*, 797 F.2d 206, 213 (5th Cir. 1986). The Court found that because no evidence had been introduced to show that a dependent son would soon be married, there was no need to reduce his award.

child no longer is dependant on her parent, especially when the older child remained dependant on his parent past the age of majority.

D. *Future Support*

Defendant contends that the judgment does not reflect a reduction of the amounts found to represent the deceased's own necessary consumption. This simply is not true. The economists' reports were stipulated to at trial, and both economists factored Mr. Randall's consumption of future support. Because this was considered, I affirm my fact findings in computing the loss of future support amount.

E. *Pain and Suffering Amount*

Defendant contends that the award for pain and suffering was excessive and not supported by the evidence. I disagree. The reasons behind finding such an amount were recited extensively when I gave the judgment and I affirm these reasons. Although I do not wish to address them again, I will give a brief summation. The death of T.F. Randall was not an ordinary drowning. If it were, certainly a lower pain and suffering amount would have been appropriate. However, T.F. Randall fought for his life for at least twenty minutes before his death. He did so in the tumultuous Gulf of Mexico during a storm. Witnesses described the deceased as having endured a physical beating against the platform structure. Especially because the platform was covered with barnacles, he suffered extensive bleeding and lacerations to his chest and undoubtedly much pain. When one considers the size award given to victims for pre-death anguish that lasts only a couple minutes or even seconds, the amount I awarded for at least twenty minutes of traumatic anguish was not excessive.

F. *Contributory Fault*

Defendant contends that the award of damages should be reduced by the contributory fault of the deceased. At trial, I considered testimony and evidence addressing whether Mr. Randall had been at all at fault and found that defendants did not show that he had been. Because this issue already has been considered and decided, I will not re-address it.

G. *Duty of Care Standard*

Finally, defendant contends that I erred in applying a "highest duty of care" standard owed to a passenger by it, instead of a "reasonable duty of care" standard. In fact, in giving my judgment, I said that the duty owed is "reasonable care under the circumstances of each case," citing *Smith v. Southern Gulf Marine Co.*[12] As far as defendant's allegations that my findings of fact were wrong, I considered all of the evidence and made my fact findings. I have addressed defendant's points and will not re-address them. Given the facts that I found from the evidence, I affirm that defendant did not exercise a reasonable duty of care and that its vessel was unseaworthy. Accordingly,

IT IS ORDERED that defendant Sea Savage, Inc.'s motion is granted in so far as the judgment is amended to provide that the pre-judgment interest awarded applies only to accrued damages, not to future damages. The remainder of the motion is denied.

/s/ Morey L. Sear
MOREY L. SEAR
United States District Judge

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[12] 791 F.2d 416, 420-21 (5th Cir. 1986).

Minute Entry [Date of Entry Feb. 19, 1992]
Sear, J.
February 18, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346 C/W 89-4795

SECTION "G"

BARBARA RANDALL, *et al.*

versus

CHEVRON U.S.A., INC., *et al.*

MEMORANDUM AND ORDER

Theodore Randall drowned while attempting a swing rope transfer from a fixed platform in the Gulf of Mexico to the M/V SEA SAVAGE. At the time of his death, he was employed by Chevron U.S.A., Inc. ("Chevron"). Chevron had time chartered the M/V SEA SAVAGE, from Sea Savage, Inc., owner of the vessel. Plaintiff, Barbara Randall, individually, on behalf of the estate of her late husband and her children, sought damages from Chevron and Sea Savage, Inc. Chevron in turn filed a cross-claim against Sea Savage, Inc., for indemnity pursuant to the charter party. This matter was heard without a jury.

After trial on the merits, Chevron was found to have negligently ordered the vessel to encounter dangerous seas, an act done in its capacity as time charterer.[1] Accord-

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[1] *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 792 (5th Cir. 1990), citing *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 388 (5th Cir. 1987).

ingly, Chevron was cast in judgment for twenty-five percent of plaintiff's total damages. Chevron seeks indemnification from Sea Savage, Inc. for this liability.

The time charter party, provides: "Owner shall run, operate and navigate the vessel. . . . [R]esponsibility for the management and navigation and operation of the vessel shall remain at all times in the owner . . . . Owner hereby agrees to defend, indemnify and hold harmless Chevron against . . . all claims for damages, whether to person or property, and howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel." The time charter agreement parallels the legal responsibilities of owners of vessels and time charterers. The charterer directs the movements of the vessel, but the owner retains possession and control of the vessel.[2]

Sea Savage, Inc. contends that this language does not provide indemnification for any liability of Chevron as time charterer, because Chevron's duties and responsibilities as time charterer do not involve the "possession, navigation, management [or] operation of the vessel." Sea Savage, Inc. emphasizes the traditional demarcation of responsibility between vessel owner and time charterer and that only the vessel owner has control over the "possession, navigation, management [or] operation of the vessel." Sea Savage contends that the time charter agreement only required it to provide indemnification for claims arising out of Sea Savage, Inc.'s duties as owner.

Although this reasoning makes some sense, the authority cited by Sea Savage, Inc. addressing indemnification of time charterers by vessel owners[3] does not support ade-

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[2] T. Schoenbaum, *Admiralty and Maritime Law* 382, § 10-1 (1987).

[3] *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971), *cert. denied sub nom., Chevron v. Royal Ins. Co.*, 406 U.S. 921 (1972); *Hobbs v. Teledyne Movable Offshore, Inc.*, 632 F.2d 1238

quately its contention. Sea Savage suggests that these cases hold that time charter indemnity clauses do not indemnify charters for their own fault. This interpretation is overly broad. The cases cited involve transfers from platforms to vessels by way of a crane located on the platform and the crane operator *solely* was found negligent. The "charterer" was found negligent in its capacity as platform owner, not in its capacity as charterer. Therefore, the platform owner/charterer was not entitled to indemnity fom the vessel owner.

These cases differ from this one and do not command a finding that Sea Savage, Inc. does not owe indemnification to Chevron. Chevron was found negligent for ordering the vessel to encounter dangerous seas. Ordering the vessel to encounter treacherous seas is an act done in Chevron's time charterer capacity, rather than in its capacity as platform owner, thus distinguishing the Fifth circuit jurisprudence.

Whether Chevron is entitled to indemnification depends upon whether "possession, navigation, management [or] operation of the vessel," as that language is used in the time charter agreement, encompasses the act of ordering the vessel to encounter dangerous seas. Sea Savage maintains its position that this language simply describes the legal responsibilities imposed upon vessel owners in a time charter party and serves to indemnify Chevron for claims arising out of Sea Savage, Inc.'s duties as vessel owner, not for Chevron's liabilities as time charterer. Thus, Sea Savage, Inc. concludes that this language does not refer to any acts of negligence attributable to Chevron in its capacity as time charterer.

Despite the abundance of litigation in this area, this issue never has been addressed squarely. Nonetheless, the

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(5th Cir. 1980); *Smith v. Tenneco Oil Co.*, 803 F.2d 1386 (5th Cir. 1986).

Fifth Circuit's discussion in *M.O.N.T. Boat Rental Services, Inc. v. Union Oil Co.*[4] appears to provide an answer.

In *M.O.N.T.*, M.O.N.T. Boat Rental Services, Inc. "M.O.N.T.") sought contractual indemnification from Union Oil Company of Central America ("Union"). Union had time chartered a vessel owned by M.O.N.T. to transport personnel to and from rigs located offshore. During a mission, a crewmember was injured when he fell just after a large wave hit the vessel. In a separate action, the crewmember sued M.O.N.T. and, after trial on the merits, M.O.N.T. was cast in judgment. Thereafter M.O.N.T. sought indemnification from Union pursuant to the charter party. The charter party contained a protest clause which shifted responsibility to the charterer for losses arising from tasks undertaken by the master of the vessel *under protest*. M.O.N.T. sought to enforce this provision and argued that, after Union ordered the captain to transport personnel, its captain experssed his reluctance to encounter the dangerous seas. During this mission, the crewmember was injured.

At first glance, the case appears inapposite. First, *M.O.N.T.* involved a protest clause, rather than an indemnification clause. However, this distinction is meaningless because the court favorably compared the protest clause to one for indemnification. "[The protest clause] has in its practical application many of the features and consequences of an indemnity agreement."[5] Second, in *M.O.N.T.*, the vessel owner sought indemnification from the charterer, whereas here the charterer seeks indemnification from the vessel owner. Nonetheless, the case is significant because it involves a charterer's act of ordering the vessel under its control to encounter dangerous seas and discusses a vessel owner's responsibility for management and operation of a vessel under time charter.

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[4] 613 F.2d 576 (5th Cir. 1980).

[5] *Id.* at 580.

Like the charter party in this action, the charter party in *M.O.N.T.* "contained the usual understanding that the [vessel] would perform tasks designated by [charterer], while [vessel owner] . . . would man, manage and control the operation of the vessel." [6] Thus, in both actions, the vessel owner retained responsibility for the management and control of the vessel. The M.O.N.T. and Union charter party, however, contained a unique protest clause, which stated,

> [I]t is agreed that if any operation, voyage, movement, activity or inactivity on the part of Contractor ["M.O.N.T.] or the vessel is insisted upon by charterer [Union], its agents, employees or representative, and undertaken by the Master of the Vessel *under protest* on account of the opinion of the Master that said operation, voyage, movement, activity or inactivity is hazardous and likely to cause loss, damage or expense, or loss of life or personal injury, the responsibility for such loss, damage or expense, or loss of life or personal injury, shall thereupon rest solely upon Charterer.[7]

In evaluating this clause, the court recognized that clauses such as this one serve to shift liability away from the party that the law considers best able to prevent negligent acts from occurring. The court then states,

> Certainly, in a time, as opposed to bareboat, charter, the shipowner and captain are in the ideal position where matters involving management and control of the vessel are involved. The protest clause in this case covered matters relating to the control and management of the vessel, matters assigned ordinarily to M.O.N.T. under the provisions of the charter party.[8]

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[6] *Id.* at 578.

[7] *Id.*

[8] *Id.* at 580. The court ultimately held that the captain's acts of reluctance did not amount to a "protest" as that term was used in the charter party, but this holding is irrelevant to this action.

These statements become significant when the context in which the court examined the protest clause is considered. The indemnitee and vessel owner had been held liable for an injury resulting from the vessel's encounter with dangerous seas, as ordered by the charter. M.O.N.T. sought indemnification from the charterer for this liability. The court's statements thus imply that the act of ordering the vessel to encounter dangerous seas falls within the purview of management and operation of the vessel. The court recognizes, as does Sea Savage, Inc., that the vessel owner assumes responsibility for the management and operation of the vessel. The court's statements suggest that the vessel owner and captain maintain the best position to prevent any harm that may arise from an encounter with dangerous seas. Additionally, the court implies that the vessel owner will be liable for such harm, absent a contractual provision to the contrary.

Therefore, the act of ordering the vessel to encounter dangerous seas is an act of "management [or] operation" as that language is used in the charter party. However, because Chevron is seeking indemnification for its own negligence, a second issue is presented. That is, whether the indemnification provision can be construed to indemnify an indemnitee for its own negligence.

Before enforcing an indemnification clause for a indemnitee's own negligence, a court must be firmly convinced that the exculpatory provision reflects the intention of the parties.[9] Once such an intention is found, whether the indemnification clause is enforceable depends upon what law governs the agreement.

Indemnification clauses in maritime contracts are governed by federal maritime law, not state law.[10] Whether

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[9] *Unied States v. Seckinger*, 397 U.S. 203, 211, 90 S. Ct. 880, 885 (1970).

[10] *David & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990) (quoting *North Pacific S.S. Co. v. Hall Bros. Marine Rv.*

the charter party entered into between Chevron and Sea Savage, Inc. is a maritime contract depends upon "the 'nature and character of the contract,' rather than on its place of execution or performance." [11] " 'A contract relating to a ship in its use as such, or to commence or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law.' " [12] A charter party is defined as a "specialized type of maritime contract for the hire of a vessel." [13] It is a contract for the use of a vessel. There can be little doubt that it is a maritime contract. Therefore, maritime law governs the interpretation of this contract [14]. Thus, I must determine whether the charter party reflects an intent to indemnify the indemnitee for its own negligence under maritime law.

In the Chevron and Sea Savage, Inc. charter party, Sea Savage, Inc. agrees to indemnify Chevron for damages "however arising." [15] *In re Incident Aboard the D/B OCEAN KING* [16] offers guidance on whether this indemnity provision can be construed to include indemnification for the indemnitee's own negligence. The indemnification provision at issue in *D/B OCEAN KING* referred

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& Shipbuilding Co., 249 U.S. 119, 125, 39 S.Ct. 221, 223 (1919)); *M.O.N.T. Boat Rental v. Union Oil Co.*, 613 F.2d 576, 579 n.6 (5th Cir. 1980).

[11] *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990) (quoting *North Pacific S.S. Co. v. Hall Bros. Marine Rv. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S. Ct. 221, 223 (1919)).

[12] *Id.* (quoting E. Jhirad, A. Sann, B. Chase, & M. Chynsky, *Benedict on Admiralty*, § 182 (1988)).

[13] T. Schoenbaum, *Admiralty and Maritime Law*, § 10-1 (1987).

[14] *See Atlantic Lines, Ltd. v. Narwhal, Ltd.*, 514 F.2d 726, 731 (5th Cir. 1975) ("[T]he interpretation and construction of the charter party is governed by federal law.").

[15] Exhibit A to Sea Savage's memorandum in support of its motion for summary judgment, filed October 11, 1991.

[16] 758 F.2d 1063 (5th Cir. 1985).

to damages arising "from any cause." The court found that this language unambiguously included indemnification for the indemnitee's own negligence. As there is no notable difference between "from any cause" and "howsoever arising," "howsoever arising" likewise must encompass indemnification for an indemnitee's own negligence. Although *D/B OCEAN KING* applied Louisiana law to the interpretation of the clause, Louisiana law requires more specificity in indemnity clauses and is more restrictive in allowing indemnification for an indemnitee's own negligence [17] than maritime law. Maritime law, on the other hand, generally recognizes and enforces contract indemnity.[18] If Louisiana law would recognize an intent to indemnify an indemnitee for its own negligence, then surely maritime law would as well.

Sea Savage, Inc. further argues that indemnification for Chevron's own negligence violates public policy, such as that pronounced in Louisiana's Oilfield Indemnity Act [19]. If Sea Savage, Inc. suggests that the Oilfield Indemnity Act (the Act) applies to this contract, it is in error. The Act has no application because maritime law governs the charter party. Sea Savage, Inc., however, may suggest only that the public policy expressed in the Act should void the charter party indemnification clause.

This contention also fails. The Fifth Circuit has awarded negligent tortfeasors indemnification pursuant to maritime contracts.[20] In so doing, the Fifth Circuit did

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[17] *See, e.g., Orduna S.A. v. Zen-noh Grain Corp.*, 913 F.2d 1149, 1153 (5th Cir. 1990); *M.O.N.T. Boat Rental Services, Inc. v. Union Oil Co.*, 613 F.2d 576 (5th Cir. 1980).

[18] T. Schoenbaum, *supra* note 12, 152, § 4-15 (1987); *see also Texas Eastern Transmission Corp. v. McMoRan Offshore Exploration Co.*, 877 F.2d 1214 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 332 (1990); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986).

[19] La. Rev. Stat. Ann. 9:2780.

[20] *Texas Eastern Transmission Corp. v. McMoRan Offshore Exploration Co.*, 877 F.2d 1214 (5th Cir. 1989) (tower held responsi-

not consider indemnifying an indemnitee for its own negligence contrary to public policy. In addition, maritime law explicitly has carved out only two factual circumstances in which an indemnitee cannot be indemnified for its own negligence. First, contracts releasing a towing company from all liability arising out of its services are contrary to public policy.[21] Second, vessels cannot obtain indemnity from an employer of an employee covered by the Longshore Harbor Workers Compensation Act, pursuant to the Act.[22] As this case does not involve either exception to the general maritime policy, the indemnification clause is not void as contrary to public policy.

Chevron seeks indemnification from the vessel owner for its liability to plaintiff, as well as its attorney fees and costs. In the charter party, Sea Savage, Inc. "agrees to defend, indemnify and hold harmless Chevron against any and all claims for damages . . . howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel." An indemnity clause in a maritime contract, whether governed by maritime or Louisiana law, should be read as a whole and, unless the provision is ambiguous, its words given their plain meaning. It should be construed to cover all losses reasonably contemplated by the parties.[23]

By the very nature of an indemnity agreement, Chevron recovers any amounts it owes plaintiff. In this charter

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ble for indemnifying an indemnitee for its negligence), *cert. denied,* 110 S. Ct. 332 (1990).

[21] *Bisso v. Inland Waterway Corp.,* 349 U.S. 85, 90, 75 S.Ct. 629, 632 (1955).

[22] *Pippen v. Shell Oil Co.,* 661 F.2d 378 (5th Cir. Unit A Nov. 1981).

[23] *Weathersby v. Conoco Oil Co.,* 752 F.2d 953, 955-56 (5th Cir. 1984); *Kemp v. Gulf Oil Corp.,* 745 F.2d 921, 924 (5th Cir. 1984); *Corbitt v. Diamond M. Drilling Co.,* 654 F.2d 329, 333 (5th Cir. 1981).

party however, Sea Savage, Inc. also agrees to "defend" Chevron. The plain meaning of "defend" grants Chevron recovery for its attorney fees. Also, the charter party uses the term "hold harmless." The Fifth Circuit has held that "[t]he duty to indemnity and hold harmless includes the payment of costs and attorney's fees."[24] Yet, the indemnitee cannot recover its attorneys' fees incurred in establishing its right to indemnification.[25] Thus, Chevron's recovery for attorney fees is limited to those fees incurred in defending plaintiff's suit.[26] I refer the determination of the amount of those fees to the Magistrate Judge. The Clerk of Court will determine the amount of costs recoverable, pursuant to Uniform Local Rule 5.04 and 5.041.

Chevron filed an intervention in this action to recover the worker's compensation and funeral expenses it paid on behalf of Theodore Randall. Plaintiff recognizes Chevron's right to reorder these amounts.[27] As such, plaintiff's judgment will be offset by the worker's compensation payments previously received by plaintiff.

Finally, Chevron seeks to recover from Sea Savage, Inc. the worker's compensation it has paid on behalf of Theodore Randall. I have previously held that Mr. Randall was covered by the Longshore and Harbor Worker's Compensation Act. As a LHWCA employer, Chev-

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[24] *Lirette v. Popich Bros. Water Transport, Inc.*, 699 F.2d 725, 728 (5th Cir. 1983).

[25] *Nathaniel Shipping, Inc. v. General Electric Co.*, 920 F.2d 1256, 1269 (5th Cir.), *modified on other grounds*, 932 F.2d 366 (5th Cir. 1991); *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164, 1178 (5th Cir. Unit A Sept. 1981), *cert. denied*, 455 U.S. 944, 102 S. Ct. 1440-41 (1982).

[26] This includes the suit brought on behalf of Randall as well as Nash, an employee of Sea Savage, Inc. injured in connection with Randall's death and whose claim was settled prior to trial.

[27] Letter from plaintiff's counsel attached to this Order and marked Exhibit A.

ron has the right to recover compensation payments made on behalf of Mr. Randall from a negligent vessel owner.[28] This right is premised upon the vessel owner's breach of the duty of due care owed to Chevron.[29] From the vessel owner's breach of its duty to the longshoreman, Randall, I infer a breach of the duty owed to Randall's employer, Chevron. "If there had been no breach of duty to the injured employee, there would have been no negligence with respect to his employer . . . ." [30] I have found Sea Savage, Inc. liable for the incompetence of its captain, the lack of training of its captain and crew, the lack of any means of communication among the crew, and the inaccessible placement of the life ring buoy. These acts of negligence likewise amount to a breach of the duty of due care owed to Chevron. Accordingly, Chevron is entitled to recover compensation paid on behalf of Randall from Sea Savage, Inc. Sea Savage, Inc., vessel owner, need only reimburse Chevron for the compensation payments that resulted from its negligence, not those that resulted from Chevron's negligence.[31] Accordingly, because I found Sea Savage, Inc.'s negligence caused 75% of plaintiff's damages, Chevron recovers only 75% of the compensation payments made on behalf of Randall.

Accordingly,

IT IS ORDERED that there be judgment in favor of Chevron, U.S.A., Inc. on its claim for indemnification from Sea Savage, Inc., including attorney fees incurred in defense and costs.

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[28] *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 417, 89 S. Ct. 1144, 1151-52 (1969).

[29] *Id.*

[30] *Hartford Accident & Indem. Co. v. Ocean Carrier Shipholding*, 799 F.2d 1093, 1097 (5th Cir. 1986).

[31] *Hartford Accident & Indem.*, 799 F.2d at 1096.

IT IS FURTHER ORDERED that plaintiff's judgment be reduced by the funeral expenses and worker's compensation payments paid by Chevron U.S.A., Inc.

IT IS FURTHER ORDERED that Sea Savage, Inc. reimburse Chevron U.S.A., Inc. for 75% of compensation payments made on behalf of Theodore Randall.

IT IS FURTHER ORDERED that the determination of Chevron's award of attorney fees is referred to the United States Magistrate Judge.

/s/ Morey L. Sear
MOREY L. SEAR
United States District Judge

EXHIBIT A

UNGAR & WHEELAHAN
A Professional Law Corporation
Marchand House Vieux Carre
830 Royal Street
New Orleans, Louisiana 70116

Telephone: (504) 566-1666

January 15, 1992

Honorable Morey L. Sear
United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, LA 70130

Dear Judge Sear:

You have recently taken several post-trial motions under advisement including a motion by Chevron to recognize its right, as third-party intervenor, to recover compensation payments which have been paid to Mrs. Randall through the date of judgment. While Plaintiffs do not oppose that, indeed, acknowledge Chevron's right to reimbursement for these sums we only ask that the judgment recognize that this right is based upon federal law, and in particular, the Longshoremen and Harbor Workers' Compensation Act.

Chevron's motion assumes that they are entitled to recovery under the Louisiana Workers' Compensation Act, a position which Plaintiffs feel is unfounded in light of the Court's previous determination, in ruling on a motion for summary judgment filed by Chevron, that the late Mr. Randall was a longshoreman. We only ask that any

order reflecting Chevron's right to reimbursement contain language which is consistent with the Court's prior ruling.

Sincerely,

UNGAR & WHEELAHAN

/s/ Randy J. Ungar
RANDY J. UNGAR

RJU/ga

Minute Entry [Date of Entry Mar. 17, 1992]
Sear, J.
March 13, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346 C/W 89-4795

SECTION "G"

BARBARA RANDALL, *et al.*

versus

CHEVRON U.S.A., INC., *et al.*

MEMORANDUM AND ORDER

Theodore Randall drowned while attempting a swing rope transfer from a fixed platform in the Gulf of Mexico to the M/V SEA SAVAGE. At the time of his death, he was employed by Chevron U.S.A., Inc. ("Chevron"). Chevron had time chartered the M/V SEA SAVAGE, from Sea Savage, Inc., owner of the vessel. Plaintiff, Barbara Randall, individually, on behalf of the estate of her late husband and her children, sought damages from Chevron and Sea Savage, Inc. Chevron in turn impleaded Underwriters Subscribing to Policy no. 12890 ("Underwriters"),[1] Sea Savage, Inc's primary protection and in-

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[1] The Underwriters consist of Royal Insurance Company, Americas Insurance Company, Underwriters at Lloyds, and Texas Marine Underwriters Agency, Inc. *See* Exhibit C attached to Chevron U.S.A. Inc.'s Opposition to American Home Assurance Company's Motion to Dismiss, Doc. No. 191, p. 26 (hereinafter "Primary P & I Policy").

demnity ("P & I") insurer, and American Home Assurance Company ("American Home"), Sea Savage, Inc.'s excess P & I insurer. Chevron sought insurance coverage because it was named an additional assured under the Sea Savage, Inc. policies.

On October 11, 1991, Underwriters filed a motion for summary judgment on Chevron's insurance claim. On November 5, 1991, during the pretrial conference, conducted on the record, the Underwriters' motion was granted because Underwriters argued and I ruled that the claim asserted against Chevron by plaintiff Williams fell outside the scope of the policy. The policy limits coverage to liability incurred "as owner" of an insured vessel and Chevron's liability could only be incurred as "time charterer," not "owner."[2] On November 7, 1991, American Home adopted and urged the same motion as the one granted in favor of Underwriters. Prior to beginning the trial, American Home's motion was granted for the same reason.[3]

This matter was heard without a jury. Following trial on the merits, Chevron, in its capacity as time charterer, was found to have negligently ordered the vessel to encounter dangerous seas.[4] Accordingly, Chevron was cast in judgment and its negligence was fixed at twenty-five percent of plaintiff's total damages.

Chevron filed a motion styled "Motion for New Trial," which in fact seeks reconsideration of my ruling on its entitlements to insurance coverage in light of the findings of fact made following the trial. Sea Savage, Inc., on behalf

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[2] A Minute Entry documenting this action was not filed.

[3] A Minute Entry documenting this action was not filed.

[4] *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 792 (5th Cir. 1990) (holding that ordering a vessel to encounter dangerous seas is an act done as a time charterer, rather than as a platform owner) (citing *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 388 (5th Cir. 1987)).

of Underwriters, opposes reconsideration.[5] After reviewing memorandum of counsel and applicable law, I find that reconsideration is appropriate. I further find that no prejudice will result from reconsideration of my previous ruling, even though the insurers did not directly participate in the trial of this action.

First, if Chevron is entitled to insurance coverage, that coverage does not impose upon the insurer a duty to defend its assured. The policy covers "[c]osts, charges and expenses, reasonably incurred and paid by the Assured in defense against any liability insured against." Yet, no where in the policy does the assurer agree to provide the assured with a defense. Rather, pursuant to the terms of the policy regarding the defense of any liability insured against under the policy, "the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance." [6]

Second, if Chevron is entitled to coverage, the Underwriters interest in defending this action was not affected as a result of its dismissal as a named defendant for the reason that the Underwriters at all times remained exposed for any liability that woulld be imposed upon its named assured, Sea Savage, Inc., and for their assured's defense costs. The policy provides,

> [t]he Assurer hereby undertakes to make good to the Assured . . . all . . . (14) [c]osts, charges and expenses, reasonably incurred and paid by the Assured in defense against any liability insured against hereunder in respect of the vessel named herein, subject to the agreed deductibles applicable, and subject fur-

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[5] Memorandum in Response to Chevron's Post-Trial Motions and Memoranda on Indemnity and Insurance Issues, Doc. No. 314, p. 3-7.

[6] *See* Primary P & I Policy, third page of the form found at p. 20.

ther to the conditions and limitations hereinafter provided.

GENERAL CONDITIONS
AND/OR LIMITATIONS

Warranted that in the event of any occurrence which may result in loss, damage and/or expense for which this Assurer is or may become liable, the Assured will use due diligence and give prompt notice thereof and forward to the Assurer as soon as practicable after receipe thereof, all communications, processes, pleadings and other legal papers or documents relating to such occurrences.

The Assured shall not make any admissions of liability, either before or after any occurrences which may result in a claim for which the Assurer may be liable. The Assured shall not interfere in any negotiations of the Assurer, for settlement of any legal proceedings in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance. If the Assured shall fail or refuse to settle any claim as authorized by Assurer, the liability of the Assurer to the Assured shall be limited to the amount for which settlement could have been made.

Whenever required by the Assurer the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Assurer in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.[7]

The policy provisions prohibiting the assured from interfering in settlement negotiations and compelling the as-

[7] *Id.*

sured to cooperate in any defense suggest that Underwriters had the option to defend its assured, Sea Savage, Inc., if it chose to. Yet, despite its potential exposure to any liability that might be imposed upon its assured and its obligation to reimburse defense costs incurred by its assured, Underwriters elected not to provide Sea Savage, Inc. with a defense nor to participate in the trial by assisting Sea Savage, Inc.'s retained counsel. Rather, Underwriters relied exclusively on Sea Savage, Inc.'s retained counsel to protect their interest, as it relies on Sea Savage in this motion. Because the Underwriters had the opportunity to participate and defend this action, I find that they are not prejudiced by reconsideration of my previous ruling dismissing them and their subsequent absence from the proceeding.

Underwriters admit that Chevron was named as an additional assured on their protection and indemnity policy.[8] They contend, however, that the policy does not provide Chevron coverage for its loss because the policy terms limit coverage to losses incurred by Chevron as owner of an insured vessel. In denying coverage, the Underwriters rely on the following provision: "The Assurer hereby undertakes to make good *to* the Assured . . . all such loss and/or damage and/or expense as the Assured shall *as owners* of the vessel named herein have become liable to pay and shall pay on account of . . . [l]iability for loss of life of . . . any person."[9] The Underwriters contend that because Chevron incurred its liability as time charterer and because maritime law does not characterize a time charterer as an owner of a vessel, Chevron is not covered by the policy.

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[8] Memorandum in Support of its Motion for Partial Summary Judgment on Chevron's Claims for Indemnity and Third Party Demand, Doc. No. 263, p. 6 (hereinafter "Doc. No. 263"). *See* Primary P & I Policy, p. 8.

[9] Primary P & I Policy, page one of the form found at p. 20 (emphasis added).

First, Chevron argues that the policy permits additional assureds, such as Chevron, to deleted the "as owner" clause and that it was in fact deleted. Specifically, the policy provides:

> The so-called Other Than Owner, As Owner and/or Other Insurance clauses contained in this Policy shall not apply in respect of Named Assureds and shall also be deemed deleted as may be required by contract in respect of additional assureds. The insurance shall be deemed primary insurance as required by contract.
>
> Notwithstanding the above, this clause shall not extend the insuring conditions beyond vessel operations.[10]

Thus, an additional assured can have any or all of these clauses deleted by way of a contract. Indeed, Chevron expressly had the "other than owner" clause deleted by an endorsement to the policy.[11] Specifically, that endorsement states: "With respect to . . . Chevron U.S.A. . . ., it is noted and agreed that the so called 'other than owners' clause contained in this policy shall not apply." [12] Chevron contends that the endorsement deleting the "other than owner" clause served to delete the "as owner" clause as well. I disagree.

The phrases "other than owner" and "as owner" each has a distinct and separate purpose. The "other than owner" clause refers to the following provision:

> It is expressly understood and agreed if and when the Assured under this policy has any interest other than as a shipowner in the vessel or vessels named herein, in no event shall the Assurer be liable hereunder to any greater extent than if such Assured were the

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[10] Primary P & I Policy, p. 12.

[11] Primary P & I Policy, Endorsement p. 1.

[12] *Id.*

owner and were entitled to all the rights of limitation to which a shipowner is entitled.[13]

The intent of the "other than owner" clause is "to limit the underwriter's liability to an amount no greater than that to which the assured would be entitled to limit liability if that assured were the owner." [14] Thus, deleting the "other than owner" clause simply waives the insurer's right to limit its liability to that of the shipowner, who possesses the statutory right to limit liability to the value of is vessel and pending freight.[15]

The "as owner" clause, on the other hand, focuses on the status of the assured when the claim arose and limits the insurer's exposure to those liabilities that can be incurred as owner of a vessel.[16] Thus, deleting the "as owner" clause expands the capacities in which insured losses can occur [17] yet, under the terms of the Underwriters' policy, the loss still must pertain to vessel operations.[18] Because the purpose of the "other than owner" clause differs from that of the "as owner" clause, expressly deleting one does not effectively delete the other.

In support of its contention that the endorsement deleting the "other than owner" phrase also served to delete the "as owner" phrase, Chevron cites *Helaire v. Mobil*

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[13] Primary P & I Policy, page 3 of form found at p. 20.

[14] A. Parks, *The Law and Practice of Marine Insurance and Average* 1024 (1987).

[15] *See* 46 U.S.C. § 183.

[16] *Id.* at 913.

[17] *Cf. Helaire v. Mobil Oil Corp.*, 709 F.2d 1031 (5th Cir. 1983) (By deleting the "as owner" clause, the P & I policy covers liabilities incurred in the assured's capacity as platform owner.)

[18] Primary P & I Policy, p. 12. Following the provision permitting deletion of the "as owner" clause, the policy provides that, "Notwithstanding the above, this clause shall not extend the insuring conditions beyond vessel operations."

Oil Corp.,[19] in which the district judge considered the same coverage provision at issue here and found that the "as owner" restriction had been deleted from the policy. The opinion however does not indicate how the time charterer had the "as owner" restriction deleted. The opinion simply states: "We take particular notice of the deletion of the clause 'as owners of the vessel herein,' from the language of the policy."[20] Later the court states:

> Secondly, the charter agreement required [the vessel owner] to furnish insurance to [the time charterer] with endorsements removing the "other than owner" limitation clauses. This was done by deleting the restrictive wording from the insuring agreement . . . . The deletions remove from this policy the restrictive coverages "as owner of the vessel". . . .[21]

Chevron asserts that its endorsement deleting the "other than owner" clause "is the exact same deletion as in *Helaire,*" which served to delete the "as owner" restriction.[22] Yet, Chevron does not elaborate on how it reached this conclusion and I do not find that the *Helaire* opinion supports Chevron's contention.

Chevron alternatively submits that the time charter party required that the "as owner" restriction be deleted. Under the terms of the policy, the "as owner" clause can be deleted by another contract.[23] Chevron contends that the following provision in the time charter party re-

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[19] 497 F. Supp. 633 (W.D. La. 1980), *modified* 709 F.2d 1031 (5th Cir. 1983).

[20] *Id.* at 636.

[21] *Id.* at 637.

[22] Chevron's Memorandum in Support of its Motion for New Trial, Doc. No. 305, p. 9.

[23] "The so-called . . . As Owner . . . clause[] . . . shall . . . be deemed deleted as may be required by contract in respect of additional assureds." Primary P & I Policy p. 12.

quires deletion of the "as owner" restriction: "[O]wner will . . . provide and maintain insurance covering all liabilities which might arise from the possession, management, manning, navigation and operation of the vessel, . . . on which policies Chevron shall be included as party assured . . . ." [24] That language indeed requires Sea Savage, Inc. to provide insurance coverage for all liabilities arising—from the "possession, management, liabilities, navigation and operation" of the vessel. Yet, that language cannot modify Sea Savage, Inc.'s insurance policies because the Underwriters were not a party to the charter party. Accordingly, the "as owner" restriction never was deleted.

The policies therefore provide insurance coverage to Chevron only if Chevron's incurs liability "as owner" of the vessel. Having found Chevron liable in its capacity as time charterer, the issue becomes whether a time charterer incurs liability "as owner" of a vessel. No court yet has squarely addressed whether a protection and indemnity policy restricted to losses incurred "as owner" covers liability incurred as time charterer, although the Fifth Circuit, and district courts within this circuit, have considered related issues. In so doing, the Fifth Circuit has advanced two legal propositions that suggest that a time charterer indeed incurs liability as owner of a vessel. But, the holdings on which these propositions rely rest on facts that are absent from this action. Therefore, they are not dispositive.

The first proposition derives from the Fifth Circuit's opinion in *Lanasse v. Travelers Insurance Co.*,[25] where it addressed the "as owner" restriction in a vessel owner's P & I policy. The court reasoned that, to incur liability "as owner," "[t]here must be some causal operational relation between the vessel and the resulting injury." [26] In

[24] Doc. No. 263, Exihibit A.

[25] 450 F.2d 580 (5th Cir. 1971), *cert. denied*, 406 U.S. 921 (1972).

[26] *Id.* at 584 (emphasis added).

this action, Chevron's contribution to Randall's death, ordering the vessel to encounter dangerous seas, clearly is related to the vessel. As such, pursuant to the proposition advanced in *Lanasse,* Chevron incurred its liability "as owner" of the vessel. But I do not find this proposition dispositive of this issue, in light of the holding in *Lanasse* and its progeny.

In *Lanasse,* Chevron had time chartered a vessel from Cheramie to assist in its operations on a fixed offshore production platform, which it owned. Chevron ordered the vessel to move a welding machine from one side of the platform to the other. Chevron's crane operator loaded the machine onto the vessel. The vessel moved to the other side of the platform. In attempting to unload the machine from the vessel, the crane operator allowed the machine to slip from its hold and it nearly crushed Lanasse, a crew member aboard the vessel. The negligence of Chevron's crane operator was found to be cause of Lanasse's injury. That negligence derived solely from Chevron's capacity as platform owner, rather than time charterer.[27] Accordingly, the court held that Chevron did not incure its liability "as owner" of the vessel and denied Chevron coverage from the vessel owner's P & I insurers. The court reasoned that the only relation the injury had to the vessel was that it occurred on the vessel; no vessel-related negligence caused the injury. The Fifth Circuit then concluded, in dicta, that some causal relation between the vessel and the injury was necessary. It did so imply to emphaize that the locale of the injury alone does not mean liability was incurred "as owner" of a vessel. Additionally, no court has solely relied on the casual relation between the vessel and the resulting injury to hold that liability was incurred "as owner" of the vessel. Thus, it is not clear whether the Fifth Circuit would hold that Chevron incurred its liability "as owner" simply because its negligent act is related to the vessel.

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[27] *Id.* at 584.

The second legal proposition that appears to control this issue is the Fifth Circuit's statement that, "[i]nsurance coverage extends only to the liability the insured incurs in its capacity as an owner, operator, or *charterer* of the vessel/s named in the policy."[28] This proposition suggests that, having incurred its liability as time charterer, Chevron is covered by the Insurers' P & I policies. But, it is not certain that, when the Fifth Circuit used the term "charterer," it was referring to time charterers, rather than only demise or bareboat charterers, who clearly incur liability "as owners" of a vessel.[29]

Moreover, the cases relied upon in advancing this proposition do not hold that a time charterer's liability is incurred "as owner" of a vessel, even though the cases do involve a time charterer's liability and the extent of the vessel owner's P & I coverage. For instance, after stating the above proposition, the Fifth Circuit simply held that the vessel on which the personal injury occurred was not listed on the P & I policy, thus the policy afforded the time charterer no coverage.[30] Similarly, the Fifth Circuit has held that a vessel owner's P & I policy did not provide coverage for the time charterer's liability incurred in its capacity as platform owner.[31]

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[28] *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199, 203 (5th Cir. 1990).

[29] *See, e.g., Stocksill v. Petty Ray Geophysical*, 888 F.2d 1493, 1496 (5th Cir. 1989); *Offshore Logistics Servs. v. Mutual Marine Office*, 462 F. Supp. 485, 489-92 (E.D. La. 1978) (Sear, J.), *dismissed on other grounds*, 639 F.2d 1168 (5th Cir. 1979). I held that the demise charterer's negligent act of ordering a crew change in bad weather satisfied the *Lanasse* causal operational relation nexus and was done "as owner." I however expressly relied on admiralty law's characterization of demise charterers as owners *pro hac vice*. Thus, the vessel owner's P & I policy, which contained the same restriction here—that is, it limited coverage to losses insurred as owners of the vessel, covered the charterer.

[30] *Id.* at 203.

[31] *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301, 1303 (5th Cir. 1986). The court did not address whether the

On two occasions, the Fifth Circuit has held that the vessel owner's P & I insurer owed coverage to the time charterer. But, in one, the insurance policy recognized the assured's right to time charter the vessel and expressly provided coverage "for the account of the owner and charterer."[32] In the other, the "as owner" restrtictive clause had been deleted from the P & I policy.[33] Because the key fact supporting each of these holdings is absent here, these cases do not control whether a time charterer's liability arises "as owner" of a vessel. In the absence of dispositive jurisprudence, I find the general principles of maritime law persuasive.[34]

General maritime law treats a demise charterer as a vessel owner, termed *pro hac vice,* because the demise charterer obtains full possession and control of the vessel, such that it mans and supplies the vessel. Conversely, in a time charterer, the vessel owner retains possession and

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policy provided coverage for liability incurred as a time charterer because the insurer had settled with the injured plaintiff on its behalf, on behalf of the vessel owner and on behalf of the time charterer to the extent of its liability incurred in that capacity. Thus, the court did not have to address the issue presented here. As such, the court does not describe the policy's terms. Without knowing the policy's terms, that the insurer appeared to recognize its coverage for the time charterer's liability, by settling on behalf of the time charterer, in no way suggests that the Insurers' policy too covers Chevron's liability.

[32] *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 242 n.3 (5th Cir. 1977).

[33] *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983).

[34] As a related issue, I note that several courts have held that a barge owner is not entitled to insurance coverage from the tug's insurer, whether or not the barge owner has time chartered the tug and/or has been named as an additional assured. *In re the ADMIRAL TOWING AND BARGE CO.*, 767 F.2d 243 (5th Cir. 1985); *Dow Chemical Company v. Tug THOMAS ALLEN*, 349 F. Supp. 1354 (E.D. La. 1972); *Motes v. Hugh Eymard Towing Co.*, 1989 WL 1843 (E.D. La. 1989).

control and crews the vessel; the time charterer simply directs the movement of the vessel.[35] General maritime law therefore does not bestow owner *pro hac vice* status upon the time charterer. But, the Longshore and Harbor Workers Compensation Act (LHWCA) does. LHWCA defines "vessel" as

> any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.[36]

The definition thus characterizes a "charter" as a vessel owner. That the definition elsewhere specifically lists "owner pro hac vice" and "bare boat charterer" indicates that "charter" must refer to time charterers. Indeed, the Fifth Circuit has adopted this interpretation and concluded that a time charterer is a vessel owner.[37]

In *Helaire v. Mobil Oil Co.*, Mobil had time chartered a vessel from Cheramie, the vessel owner. Mobil sought coverage from the vessel owner's P & I insurers. The insurers argued that Mobil's negligence arose from its capacity as platform owner, rather than as time charterer and that their P & I policy only covered Mobil in its role as vessel owner, not as platform owner. Thus, they contended that Mobil was not covered by their policy. The Fifth Circuit stated,

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[35] T. Schoenbaum, *Admiralty and Maritime Law* 382 (1987).

[36] 33 U.S.C. § 902(21).

[37] *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1041 (5th Cir. 1983). *See also Aucoin v. Pelham Marine, Inc.*, 593 F. Supp. 770, 772 (W.D. La. 1984) (holding that a time charterer is a vessel for purposes of LHWCA); A. Parks, *supra* note 14, at 884 ("Several cases hold that the time charterer is a viable 905(b) defendant within the meaning of the term 'vessel,' which L.H.W.C.A. defines to include 'charterer [sic] or bare boat charterer.' ").

> It is undisputed that Mobil, as time charterer of the vessel, would normally be covered under the broad definition of "vessel owner" under 33 U.S.C. § 902(21) [quoted above] and thus subject to potential liability under § 905(b).[38] Mobil claims against the underwriters for indemnity because it is vessel owner under 905(b).[39]

The court never squarely held that, if Mobil's liability arose from its status as time charterer, it likewise was incurred as a vessel owner and Mobil would be entitled to insurance coverage, but that conclusion is implicit in the foregoing statement.

The court ultimately held that Mobil's act of negligence arose from its capacity as time charterer and that the P & I policy provided Mobil with coverage because the "as owner" restrictive clause had been deleted from the P & I policy. The court found that, in the absence of the "as owner" restriction, the policy covered Mobil's liability "regardless of whether Mobil incurred liability as a 'vessel owner' or as a 'platform owner.' "[40] I find this holding significant. If deleting the "as owner" restrictive phrase expands coverage to include liabilities incurred as platform owner, it follows that incurring liability "as owner" encompasses liability incurred as time charterer.

Because the LHWCA treats a time charterer as a vessel owner and because Chevron's negligence arose from its status as time charterer, Chevron incurred its liability "as owner" of the vessel. Accordingly, the Underwriters owe Chevron insurance coverage.

Alternatively, if Sea Savage, Inc.'s P & I policy does not provide coverage for Chevron's liability, then Sea Savage, Inc. must provide coverage to Chevron. In the

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[38] Section 905(b) permits a person covered by the LHWCA who is injured as a result of the negligence of a vessel, to recover damages for those injuries from the vessel.

[39] *Helaire*, 709 F.2d at 1041.

[40] *Id.* at 1042.

charter party, Sea Savage, Inc. agreed to "provide and maintain insurance covering all liabilities which might arise from the possession, management, manning, navigation and operation of the vessel, . . . on which policies Chevron shall be included as party assured . . . ."[41] I previously held that Chevron's negligent act of ordering the vessel to encounter dangerous seas is an act of management or operation of the vessel.[42] As such, Sea Savage, Inc. was contractually obligated to provide coverage for Chevron's liability. If its P & I policy does not provide Chevron with coverage, then Sea Savage, Inc. breached its agreement and must provide the coverage to Chevron.[43]

Finally, the excess P & I policy provisions tailor the primary P & I policy provisions. The excess insurer, American Home, "agrees to indemnify the Assured for all liability, loss, damage or expense insured against under the . . . 'Primary Policies,' " for the excess over the limits of the primary policy.[44] The excess policy further provides that it "shall follow absolutely the Underlying Policy with respect to the naming of Additional Assureds."[45] Accordingly, because the excess P & I policy provides identical coverage as the primary policy, this decision applies to American Home Assurance Company as well.[46]

Accordingly,

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[41] Doc. No. 263, Exhibit A.

[42] Memorandum and Order dated February 18, 1992, p. 7.

[43] *Stocksill v. Petty Ray Geophysical*, 888 F.2d 1493, 1496 (5th Cir. 1989) (holding that, if the vessel owner fails to obtain the insurance coverage on behalf of the time charterer that it contractually agreed to provide, then the vessel owner must provide the time charterer with coverage).

[44] Motion to Dismiss on Behalf of American Home Assurance Company, Doc. No. 178, Exhibit A, p. 3 (hereinafter "Excess P & I Policy").

[45] *Id.* at p. 5.

[46] *See* American Home Assurance Company's Memorandum in Support of its Motion for Summary Judgment, Doc. No. 296.

IT IS ORDERED that the protection and indemnity policies issued by Underwriters Subscribing to Policy no. 12890 and American Home Assurance Company owe Chevron, U.S.A., Inc. insurance coverage over plaintiff Randall's claim.

/s/ Morey L. Sear
MOREY L. SEAR
United States District Judge

Minute Entry
Sear, J.
April 20, 1992

[Date of Entry Apr. 28, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346 c/w 89-4795

SECTION "G"

BARBARA RANDALL

versus

CHEVRON U.S.A., INC., *et al.*

MEMORANDUM AND ORDER

Theodore Randall drowned while attempting a swing rope transfer from a fixed platform in the Gulf of Mexico to the M/V SEA SAVAGE. At the time of his death, he was employed by Chevron U.S.A., Inc. ("Chevron"). Chevron had time chartered the M/V SEA SAVAGE, from Sea Savage, Inc., owner of the vessel. Plaintiff, Barbara Randall, individually, on behalf of the estate of her late husband and her children, sought damages from Chevron and Sea Savage, Inc. Chevron in turn filed a cross-claim against Sea Savage, Inc., for indemnity pursuant to the charter party. This matter was heard without a jury.

After trial on the merits, Chevron, in its capacity as time charterer, was found to have negligently ordered the vessel to encounter dangerous seas.[1] Accordingly, Chev-

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[1] *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 792 (5th Cir. 1990) (holding that ordering a vessel to encounter dangerous seas

ron was cast in judgment for twenty-five percent of plaintiff's total damages. Chevron was awarded reimbursement from Sea Savage, Inc. for the worker's compensation payments made on behalf of Theodore Randall pursuant to jurisprudential doctrine.[2] Chevron's reimbursement however was reduced by Chevron's percentage of fault; thus, Chevron was awarded only 75% of the compensation paid on behalf of Theodore Randall. Chevron also was awarded indemnification from Sea Savage, Inc. for its judgment liability to plaintiffs pursuant to the terms of the charter party. Chevron now moves to alter or amend the judgment to include full recovery of the worker's compensation payments made on behalf of Theodore Randall.

Chevron argues that, because it has been awarded full contractual indemnification from Sea Savage, Inc., including indemnification for its own negligence, it likewise should be entitled to contractual indemnity for the compensation benefits, without reduction for its percentage of fault. This reasoning fails for two reasons. First, the time charter party provides Chevron with indemnification only for claims for "damages." Compensation payments are not "damages." Damages refer to pecuniary compensation recovered by a person suffering loss due to "the unlawful act or omission or negligence of another,"[3] whereas a worker receives compensation benefits regardless of the negligence of the worker or any other person.[4] Second, the charter party provides indemnification for li-

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is an act done as a time charterer, rather than as a platform owner) (citing *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 388 (5th Cir. 1987)).

[2] *See Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144 (1969).

[3] *Black's Law Dictionary* 466 (4th ed. 1968).

[4] The Longshore and Harbor Workers' Compensation Act provides, "Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. § 904(b).

abilities incurred by Chevron in its capacity as time charterer,[5] not employer. Because Chevron incurred the compensation liability as employer of Theodore Randall, it is not entitled to full indemnification for the compensation payments made on behalf of Theodore Randall.

Chevron also seeks to amend the judgment to reflect the Court's ruling on January 28, 1992, that the award of prejudgment interest only applies to accrued damages, not future damages. Although I found that this was implicit in the initial judgment, a new judgment clarifying the prejudgment interest award will be issued.

Accordingly,

IT IS ORDERED that Chevron's motion to alter or amend the judgment to include full recovery of the worker's compensation payments made on behalf of Theodore Randall is DENIED.

IT IS FURTHER ORDERED that Chevron's motion to alter or amend the judgment to clarify that the award of prejudgment interest only applies to accured damages, not future damages, is GRANTED.

/s/ Morey L. Sear
MOREY L. SEAR
United States District Judge

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[5] *See* Memorandum and Order dated Feb. 18, 1992.

[Date of Entry July 1, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-4346

SECTION G

BARBARA RANDALL

versus

CHEVRON, U.S.A.

JUDGE MOREY L. SEAR PRESIDING

JULY 1, 1992

CHEVRON, U.S.A.'S MOTION TO REVIEW MAGISTRATE AWARD OF ATTORNEY FEES (DOC. 368) WAS CALLED FOR HEARING.

FOLLOWING ORAL ARGUMENT, THE COURT ORDERS THAT THE MAGISTRATE'S AWARD OF ATTORNEY'S FEES FOR DEFENDING PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IS REVERSED BECAUSE CHEVRON IS NOT ENTITLED TO RECOVER THESE FEES. THE MAGISTRATE'S REDUCTION OF CHEVRON U.S.A., INC.'S HOURS AND HOURLY RATE IS REVERSED. CHEVRONS' HOURS AND HOURLY RATE ARE FOUND TO BE REASONABLE.

Supreme Court, U.S.
FILED
AUG 24 1994
OFFICE OF THE CLERK

NO. 94-220

In the Supreme Court of the United States

OCTOBER TERM, 1994

SEA SAVAGE, INC., UNDERWRITERS SUBSCRIBING TO POLICY A&PH 12890 AND AMERICAN HOME ASSURANCE COMPANY

Petitioner,

V.

CHEVRON U.S.A., INC.

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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4 pp

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9567

FILED
MAY 26 1994

BARBARA S. RANDALL, On Her Own Behalf and as Personal Representative of the Estate of the Decedent, Theodore F. Randall, Jr., and on the Behalf of the Children, Rod Anthony Randall and Holly Leann Randall,

Plaintiff-Appellee-Cross Appellee,

versus

CHEVRON, U.S.A., INC.,

Defendant-Appellee-Cross Appellant,

versus

SEA SAVAGE, INC., ET AL.,

Defendants-Appellants-Cross Appellees,

versus

AMERICAN HOME ASSURANCE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC
(Opinion February 11, 1994, 5 Cir. 1994, 13 F.3d 888)

Before KING and JOLLY, Circuit Judges and PARKER,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are also DENIED.

We withdraw footnote 6 of our opinion in this case. Additionally, we revise our mandate, part IV of the opinion, to read as follows:

> For the foregoing reasons, we REVERSE the district court's award for pain and suffering and REMAND for the granting of a remittitur to $500,000 or a new trial on damages at Sea Savage's option. We REVERSE the district court's holding that Chevron is entitled to indemnification from Sea Savage under the time charter for those damages attributable to Chevron's own negligence. We also REVERSE the district court's denial of attorneys' fees to Chevron for its defense of the claim for punitive damages and REMAND for determination of those fees. In all other respects the judgment of the district court, including the order that Sea Savage reimburse Chevron for 75% of the workers' compensation

* Chief Judge of the Eastern District of Texas, sitting by designation.

payments made on behalf of Theodore F. Randall, is AFFIRMED. Costs shall be borne by Chevron and Sea Savage.

ENTERED FOR THE COURT:

/s/ Carolyn (Illegible) King

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
OCT 14 1994
OFFICE OF THE CLERK

(4)

NO. 94-220

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

SEA SAVAGE, INC., UNDERWRITERS
SUBSCRIBING TO POLICY A&PH 12890
AND AMERICAN HOME ASSURANCE COMPANY
Petitioners

VERSUS

CHEVRON U.S.A. INC.
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF BY RESPONDENT, CHEVRON U.S.A. INC. TO PETITION FOR WRITS BY SEA SAVAGE, INC., *ET AL*

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OPINIONS BELOW

Petitioners, Sea Savage, Inc., its Underwriters Subscribing to Policy A&PH 12890, and American Home Assurance Company (hereinafter collectively referred to as "Sea Savage"), incorrectly state that Suggestions for Rehearing *En Banc* filed by Sea Savage and Respondent, Chevron U.S.A. Inc.,[1] have yet to be ruled upon. The Petitions for Rehearing and Rehearing *En Banc* were denied May 26, 1994. The denial of rehearing is published at 22 F.2d 568 (1994). In the Order denying the Petition for Rehearing and the Suggestions for Rehearing *En Banc*, the court revised its Mandate and removed a footnote from the original opinion. (*See* Order, Chevron's Pet. No. 94-033, App. pp. 103a-04a.)

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[1]Pursuant to Rule 29.1, Chevron submits the following list of its parent company and non-wholly owned subsidiaries to correct the List of Parties submitted by Sea Savage, Pet., p. 1, n. 1:

Parent, Chevron Corporation

Non-wholly owned subsidiaries:
Chevron Capitol U.S.A. Inc.
Chevron Oil Finance Company
Felix Oil Company
Kawanee Industries, Inc.

NO. 94-220

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

SEA SAVAGE, INC., UNDERWRITERS
SUBSCRIBING TO POLICY A&PH 12890
AND AMERICAN HOME ASSURANCE COMPANY
Petitioners

VERSUS

CHEVRON U.S.A. INC.
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF BY RESPONDENT, CHEVRON U.S.A. INC. TO PETITION FOR WRITS BY SEA SAVAGE, INC., *ET AL*

Respondent, Chevron U.S.A. Inc. ("Chevron") supports in part the Application for Writ of Certiorari filed herein by Sea Savage, Inc., *et al*, in which petitioners seek review of the judgment of the United States Court of Appeals for the Fifth Circuit dated February 11, 1994. On July 1, 1994, Chevron also filed an Application for Writ of Certiorari seeking review

of said February 11, 1994, judgment and of the Fifth Circuit's Order dated My 26, 1994, denying all parties' suggestions for *en banc* consideration.

STATEMENT OF THE CASE

Chevron supports the Petition in part. Chevron disputes only Sea Savage's statements as to the lower courts' basis of allocation of 75% of the liability to Sea Savage and 25% to Chevron. Sea Savage correctly reports that, because the district court held that Mr. Randall was a longshoreman within the meaning of the Longshore Harbor Workers' Compensation Act, it also held that the claims against all defendants are governed by 33 U.S.C. § 905(b).[2] Sea Savage argues that if the district court had considered Chevron's negligence in its capacity as the owner and operator of an offshore oil platform, then Chevron's negligence would not have been covered under the vessel's marine Protection & Indemnity policy. (Sea Savage Pet., p. 4). Contrarily, Chevron contends that the result of the previous holding would be to prevent any claim from being asserted against Chevron as the decedent's employer.

Chevron also contends that the Louisiana State Workers' Compensation Statute represents the exclusive remedy for the death of Mr. Randall. In short, Chevron supports the result of the holding of the Eleventh Circuit Court of Appeals in *Brockington v. Certified Electric, Inc.*, 903 F.2d

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[2]*See* DistrictCourt Opinion, Sea Savage Pet., App. p. 47a.

1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S. Ct. 676, 112 L. Ed. 2d 688 (1991), as opposed to the contrary result reached by the Fifth Circuit in *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820, 61 L. Ed. 2d 274 (1979).

ARGUMENT

1. Randall Was Not a Longshoreman Because He Was a Land-Based Worker

As fully briefed in Chevron's Petition, No. 94-0033, for Writ of Certiorari, Chevron agrees with Sea Savage that this Court should answer the question of whether an exclusively land-based worker who is not engaged in maritime employment is transformed into a longshore worker within the meaning of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, solely because he is injured on a vessel while being transported to and from his job site over navigable state waters. Chevron also agrees that Mr. Randall was not a longshore harbor worker. Therefore, Chevron respectfully suggests that Sea Savage's Petition should be considered together with Chevron's Petition for Writ of Certiorari, No. 94-0033, which was filed on July 1, 1994, and that writs be granted in both petitions. *See also*, Petition No. 93-1812.

2. Federal Maritime Law Does Not Preempt State Workers' Compensation Schemes

Sea Savage suggests that general maritime law preempts application of the exclusivity provisions of state compensation

statutes and requests this Court to remand this matter for further proceedings to determine the issue of insurance coverage for Chevron's share of liability for negligence. (Sea Savage, Pet. p. 4, n. 8 and p. 13, n. 14.) Chevron submits that the Louisiana Workers' Compensation Act, LSA-R.S. 23:1021 *et seq.*, provides the sole remedy for land-based, non-maritime employees.

There is a conflict among the circuits on the issue of whether a maritime remedy preempts state workers' compensation schemes. Specifically, the Third, Fifth and Seventh Circuits found preemption. *Hagans v. Ellerman & Bucknall Steamship Co.*, 318 F.2d 563 (3d Cir. 1963); *Thibodeaux v. Atlantic Richfield*, 580 F.2d 841 (5th Cir.), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820, 61 L. Ed. 2d 274 (1979); *Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502 (7th Cir. 1971). Contrarily, the First and Eleventh Circuits find no preemption. *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S. Ct. 676, 112 L. Ed. 2d 688 (1991).

States have a strong interest in application of state workers' compensation law while there is no comparable interest in favor of application of general maritime law. *Brockington*, 902 F.2d at 1533. The local character of the parties and the land-based nature of their employment indicate that their respective rights should be controlled by state law.

The Randalls availed themselves of the benefits of the Louisiana Workers' Compensation Act. The Act codified at LSA-R.S. 23:1021 *et seq.*; 23:1161 *et seq.* (1994 Supp.), constitutes a statutory compensation scheme that provides that workers' compensation benefits are an employee's exclusive remedy against his employer. LSA-R.S. 23:1032 (1994 Supp.). In exchange for imposition of strict liability, an employer is statutorily immune from civil liability. *Id.*

Limiting an entirely land-based non-maritime worker's remedy to one solely under state worker's compensation law will not work material prejudice to the characteristic features of maritime law or interfere with the proper harmony or uniformity of general maritime law in international or interstate relations. Louisiana's interest in regulating the relationship between employers and employees should govern. Therefore, if this Court finds that Randall was covered by Louisiana's Workers' Compensation Act, then this Court should further rule that the State Act is exclusive and that no maritime action can be brought against his employer.

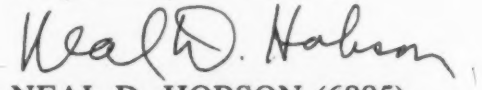
CONCLUSION

For the foregoing reasons, Respondent, Chevron U.S.A. Inc., respectfully requests that Sea Savage's Petition for Writ of Certiorari be considered jointly with Chevron's Petition No. 94-0033 for Writ of Certiorari and Sea Savage's Petition No. 94-220, and that this Court answer at last the question of whether the Longshore and Harbor Workers' Compensation Act applies to non-maritime workers injured while fortuitously

in transit to or from work. Further, Chevron requests that this Court overrule Fifth Circuit precedent which holds that federal admiralty law automatically displaces State Worker's Compensation laws and restore uniformity among the circuits.

After due proceedings be had, Chevron U.S.A. Inc. requests that there be judgment reversing the holding of the District Court and of the Court of Appeals, insofar as those judgments hold that Theodore F. Randall, Jr., was covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, and hold instead that the sole remedy for his injury is the remedy provided by the Louisiana Workers' Compensation Statute, LSA-R.S. 23:1021, *et seq.*

Respectfully submitted,



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